IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 17 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JOYCE J. BURLIN,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 92-C-478-B

MAR 20 1995

ORDER

This order pertains to Plaintiff's Motion for New Trial of Order Entered February 8, 1995 (Docket #18)[1], and Defendant's Motion to Alter or Amend Order (Docket #20). On February 8, 1995, this court denied Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1), after finding that it retained jurisdiction over this action pending a remand for testimony by a vocational expert and that the remand did not constitute a final judgment.

Plaintiff's Motion for New Trial of Order Entered February 8, 1995 (Docket #18) and Defendant's Motion to Alter or Amend Order (Docket #20) are granted. Pursuant to Rule 59(e), the court reconsiders its earlier decision and amends the order as follows.

Subsequent to its decisions in Sullivan v. Hudson, 490 U.S. 877 (1989) and Melkonyan v. Sullivan, 501 U.S. 89 (1991), the Supreme Court determined that a sentence four remand pursuant to 42 U.S.C. § 405(g) was indeed a final judgment in Shalala v. Schaefer, ___ U.S. ___, 113 S.Ct. 2625, 125 L.Ed.2d 239 (1993). The Court ruled that

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

a district court remanding a case pursuant to sentence four of § 405 must enter judgment in the case and may not retain jurisdiction over the administrative proceedings on remand, finding the sentence's plain language authorizes a court to enter a judgment "with or without" a remand order, not a remand order "with or without" a judgment. Id. at 2629.

The Court decided its ruling in Sullivan v. Hudson that fees incurred during administrative proceedings held pursuant to a district court's remand order may be recovered under the EAJA does not apply where the remand is ordered pursuant to sentence four of § 405(g). Id. at 2630-31. The Court also stated that, contrary to dicta in Sullivan v. Hudson, a Social Security claimant who obtains a sentence-four judgment reversing the Secretary's denial of benefits meets the description of a "prevailing party" set out in Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782, 791-792 (1989). 113 S.Ct. at 2632.

The court's December 14, 1994 order was a final judgment and Plaintiff is a prevailing party entitled to fees and other expenses under the EAJA. Plaintiff's counsel asks to be compensated at an hourly rate of $118.20. Under the EAJA, the statutory maximum for attorney fees is $75.00 per hour. Counsel claims an entitlement to the higher rate based on the increased cost of living since the enactment of the EAJA in 1981 as evidenced by the Consumer Price Index published by the United States Department of Labor. Counsel claims as additional grounds for the $118.20 per hour rate his experience in Social Security litigation and his continuing legal education in the area.

Section 2412(d)(2)(A) provides that: ". . . attorney's fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or

a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee." Complete discretion is afforded district courts in awarding attorney fees under EAJA. Pierce v. Underwood, 487 U.S. 552, 571 (1988); Headlee v. Bowen, 869 F.2d 548, 551 (10th Cir.), cert. denied, 493 U.S. 979 (1989). According to the CPI-Detailed Report, U.S. Department of Labor, Bureau of Labor Statistics (June 1994), the Consumer Price Index for All Urban Consumers ("CPI-U") was 93.4 in 1981 and 147.2 in May of 1994. To compute the percentage of change, the old CPI-U is subtracted from the new one, which leaves 53.8, that number is divided by the old CPI-U, which is .576, and multiplied by 100, which results in a 57.6% change. The base rate for attorney's fees is $75.00 and 57.6% of that rate is $43.20. The total fee is the base rate plus the increase in fee resulting from a higher CPI-U, or a total fee of $118.20. Counsel is entitled to attorney's fees in the amount of $2,511.75 for 21.25 hours at the enhanced rate of $118.20 per hour, $15.00 for clerk time, and $127.10 for filing and mailing fees, or a total amount of $2,653.85.

Dated this 16th day of March, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:BURLIN

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRANK G. MEFFORD and WAYNE A. LAWHORN, Plaintiffs, v. HINDERLITER INDUSTRIES, INC., a Delaware corporation, AND HINDERLITER PROFIT SHARING PLAN AND TRUST, a plan under ERISA, Defendants.	)	Case No. 92-C-359-B

STIPULATION OF DISMISSAL

COME NOW the parties in the above styled and numbered cause and stipulate to the dismissal of the above styled and numbered cause.

Respectfully submitted,

FRASIER & FRASIER

By: _____

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and

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Stipulation & Order

EJM/dse Wodarski.jdg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN MANUFACTURERS MUTUAL INSURANCE, COMPANY, an Illinois corporation,

Plaintiff,

vs.

STACEY ELAINE WODARSKI, an individual; LLOYDS PROPERTY MANAGEMENT CORP., a Delaware corporation; SWITLYK PROPERTIES & LIMITED PARTNERSHIPS, a New Jersey corporation; and DAVID ZARECKI, an individual,

Defendants.

Case No. 93-C-825 K

JUDGMENT BY DEFAULT OF DEFENDANTS LLOYDS PROPERTY MANAGEMENT CORP., SWITLYK PROPERTIES & LIMITED PARTNERSHIPS, AND DAVID ZARECKI

This matter comes on for hearing upon Application and Affidavit of the plaintiff duly made for judgment by default against defendants Lloyds Property Management Corp., Switlyk Properties & Limited Partnerships, and David Zarecki. The defendant Stacey Elaine Wodarski appeared and actively litigated this action through to an adverse Judgement filed October 27, 1994, which she has appealed. It appears that the defendants, Lloyds Property Management Corp., Switlyk Properties & Limited Partnerships, and David Zarecki, are in default and that plaintiff, American Manufacturers Mutual Insurance Company, is entitled to judgment declaring rights pursuant to its Complaint. This Court

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has examined the record and has determined that service has properly and duly been obtained upon these three defendants.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, by reason of their default, defendants Lloyds Property Management Corp., Switlyk Properties & Limited Partnerships, and David Zarecki, cannot claim coverage under Policy No. 3MH640247-00 issued by plaintiff American Manufacturers Mutual Insurance Company, for any portion of the damages contained in an Order filed of record October 23, 1992, in the District Court of Tulsa County, State of Oklahoma, in an action styled Stacey Elaine Wodarski v. Lloyds Property Management Corp. and David Zarecki, and bearing docket number CJ-92-389.

Terry C. Kern

JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAR 20 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

FRANCES HEBERT,

Plaintiff,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

93-C-495-W

ENTERED ON DOCKET

DATE MAR 20 1995

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed March 20, 1995.

Dated this 20th day of March, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RUSSELL McINTOSH,

Plaintiff,

vs.

BANCOKLAHOMA MORTGAGE CO., et al.,

Defendants.

No. 94-C-929-B

MAR 20 1995

FILED

MAR 17 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE AS TO BANCOKLAHOMA MORTGAGE CORPORATION

Come now the Plaintiff, Russell McIntosh, by and through his attorneys, Braswell & Associates, Inc., and the Defendant, BancOklahoma Mortgage Corporation, and hereby enter into a stipulation of dismissal with prejudice, pursuant to Rule 41 (a)(1), Federal Rules of Civil Procedure.

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Russell McIntosh, Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of March, 1995, a true and correct copy of the above and foregoing document was mailed, with full and sufficient postage affixed thereon, to:

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Marilyn M. Wagner

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

VALERIE ANDERSON, Individually, Plaintiff, vs. EZPAWN OKIE, INC., an Oklahoma corporation; and EZPAWN, a Texas corporation, Defendants.	)	Case No. 94-CV-665-H

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Valerie Anderson, and the Defendant, EZPawn Oklahoma, Inc., and, pursuant to Rule 41(a)(1) of the Fed.R.Civ.P., jointly stipulate to a dismissal with prejudice of the above styled cause.

Timothy P. Clancy

Of the Firm:
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ATTORNEYS FOR DEFENDANT, EZPAWN OKIE, INC.

MDB\D-F\EZCORP\ANDERSON\DISMISS.JS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUSAN R. TAYLOR,

Plaintiff,

v.

WARD PETROLEUM COMPANY, and WARD GAS SERVICES, INC., a wholly-owned subsidiary of Ward Petroleum Company,

Defendants.

No. 94-C-1040-K

DISMISSAL WITH PREJUDICE

Plaintiff, SUSAN R. TAYLOR, and Defendants, WARD PETROLEUM CORPORATION (improperly designated as Ward Petroleum Company), and WARD GAS SERVICES, INC., pursuant to Federal Rule of Civil Procedure 41, hereby stipulate and agree to the dismissal with prejudice of said cause, all issues therein presented having now been compromised, settled, satisfied, and released between the parties. The parties agree that the Court shall retain jurisdiction to resolve any future disputes which may arise in connection with the settlement agreement executed by the parties. Each party shall bear its own costs, expenses, and attorney fees.

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EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RADCO, INC.,

Plaintiff,

v.

MOHAWK STEEL COMPANY INC., el al.,

Defendants.

93-C-01102-K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This report and recommendation addresses Defendant's Motion for Summary Judgment of Patent Invalidity and Unenforceability (docket #11). Both *invalidity* and *unenforceability* are addressed separately, below.

I. Invalidity

Defendant contends that Plaintiff's U.S. Patent No. 5,078,857 ("the '857 patent") is invalid on three grounds:

a. Plaintiff offered for sale and sold the patented invention to AMOCO Oil Company and AMOCO placed it in commercial use more than one (1) year before the '857 patent application;

b. Defendant, Foster Wheeler USA Corp. offered the patented invention for sale on two separate occasions more than one (1) year before the filing date of the '857 patent application; and

c. Foster Wheeler USA Corp. built and sold a virtually identical heater in 1964.

Each is discussed *infra*.

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A. Experimentation

Plaintiff asserts that construction of the double-fired coker heater was initially an experimental undertaking and not a commercial use. Says Plaintiff:

> Whether or not a coker heater works cannot be determined in a test laboratory. Without the commitment of an owner of a $200,000,000 refinery structure in which the $3,000,000 coker heater must be installed, no coker heater could ever be adequately tested. Conversely, the inventor of a $3,000,000 coker heater needing a $200,000,000 refinery structure to test his invention is in no position to dictate terms of control over the coker heater or the refinery to the owner of the $200,000,000 facility. *Plaintiff's Response Brief* at p. 24.

Defendant's reply is straightforward. AMOCO paid RADCO "at least $3,500,000 for that heater." *Defendant's Opening Brief*, at p. 3, *Material Fact No. 10.* "The heater was installed at AMOCO's refinery in May 1987, and beginning at least as early as August 1987, following a two-month trouble-shooting period, AMOCO successfully used that heater in the commercial operations of its refinery." *Defendant's Opening Brief*, at p. 3, *Material Fact No. 11.* Defendant also notes that "AMOCO had complete control over the heater once it was delivered by RADCO and considered the heater as a 'purchased piece of equipment'. *Defendant's Opening Brief*, at p. 3, *Material Fact No. 12.*

Responsively, RADCO points to a collection of facts, consisting of AMOCO reports, including that of an independently-retained Fluor engineer, to the effect that AMOCO fully realized that the RADCO design was different from that of a single-fired coker heater, with relatively unpredictable results *vis-a-vis* run length. In this regard, the only certainty seemed to be that a double-fired design would not operate any *less* effectively than its single-fired predecessor. *See, RADCO's Response Brief, "Radco's Dispute of Defendant's Facts", Fact Nos. 26, 27, 32, 33, and 35.*

RADCO further observes that it requested, and AMOCO agreed, "to install many more additional data monitoring points on the Whiting heater than normally installed in delayed coker heaters." RADCO notes that the original four (4) thermocouples were ultimately increased to a total of fifty-two (52). *See, Radco's Response Brief, "Radco's Dispute of Defendant's Facts", Fact Nos. 36, 37, & 38.*

RADCO argues that both it and AMOCO adhered to an implied agreement that RADCO would have access to the delayed coker-heater, enabling it to monitor operating data for evaluative study of the unit. *See, Radco's Response Brief, "Radco's Dispute of Defendant's Facts", Fact Nos. 40, 41 & 42.*

B. Sale by Foster-Wheeler

Defendants assert that in November 1982 "Foster Wheeler Energy Corp., a predecessor of Foster Wheeler USA Corp., submitted a proposal to Texaco Corp. ... offering to sell a double-fired heater for use in a delayed-coking process at a lump-sum fixed price..." *Defendants' Opening Brief,* at p. 4, *Material Fact No. 19.* Defendant further opines that "The Texaco/Fluor heater meets all of the limitations of claims 1-3 of the '857 patent." *Id.*

Defendants also point out that "[i]n November 1985 Foster Wheeler USA Corp. submitted a proposal to AMOCO offering to sell a double-fired heater for use in a coking process..." *Id. at Material Fact 17.*

Plaintiff contests the assertion that the proposals developed by Foster Wheeler (by and through its predecessors) meets the claims limitations of Claims 1-3. RADCO counters:

> Contrary to paragraph 19 of Defendants' Statement of Facts and the Kraus Declaration (Def. Ex. 3), the double-fired delayed coking heater offered by Foster

Wheeler to Texaco on November 30, 1982 does not meet the limitations of claims 1-3 of the '857 patent (S. Melton Dep. pp. 287-290).

(a) The heater offered to Texaco contains two separate passes through the radiant section of the heater and not:

> ...a vertical tube bank between and spaced apart from opposite side walls of said vessel through which said feedstock is transported, said tube bank comprising a back and forth continuous path of horizontal tubing suspended generally in a first vertical plane in said vessel and extending from an inlet in said upper radiant section of said heating vessel downwardly to an outlet located in said lower radiant section of said heating vessel... *See, Radco's Response Brief, "Radco's Dispute of Defendant's Facts", Fact No. 64(a).*

The significance of Defendants' contention is simple. If Foster-Wheeler's predecessor offered for sale a double-fired delayed coker heater meeting the claims limitations set forth in the '857 patent then, argue Defendants, the patent is invalidated, citing *Paragon Podiatry Laboratory, Inc. v. KLM Labs, Inc.*, 984 F.2d 1182 (Fed. Cir. 1993). Plaintiff takes issue with the citation, observing:

> *Paragon* supra does not really deal with the issue, but merely references in a footnote *UMC Electronics Company v. United States*, supra. In the overwhelming majority of cases, reduction to practice has been found to exist before an on-sale bar has been found. Only in a minority of cases emanating from the 2 to 1 decision in *UMC*...has any departure from the "reduction to practice" been allowed. Even then elimination of the reduction to practice standard occurs only when dictated by four policy standards set forth in those cases...Those policy standards are not satisfied by the facts in this case. First of all, the public could not have believed that double fired coker heaters were freely available to all as a consequence of prolonged sales activity since there was not prolonged sales activity. In fact, Radco's prototype was the only one that had ever been built... (Emphasis added.), Plaintiff's Response Brief, at p. 32.

C. Foster Wheeler's Sale in 1964

Defendants charge that "[i]n 1964, Foster Wheeler Corporation, a predecessor of Foster Wheeler USA Corp., sold and installed a double-fired ***vacuum heater*** for Standard Oil of California". Defendants argue that "[e]xcept for the statement of intended use in the

preamble of claim 1 of the '857 patent, the double-fired vacuum heater built for Socal in 1964 meets all of the limitations of claims 1-3 of the '857 patent." *Defendants' Opening Brief*, at p. 5, ¶ (21.).

Plaintiff responds, observing "[t]he double-fired vacuum heater sold by Foster Wheeler to Socal in 1964 was not a delayed coker heater." *Plaintiff's Response Brief*, at p. 11, "*Radco's Dispute of Defendant's Facts*", Fact Nos. 48, 52, 53, 54 & 55.

D. Analysis of the Invalidity Issues

Analysis of any Rule 56 motion for summary judgment begins with a discussion of the applicable standard of review. The *Federal Rules of Civil Procedure* provide that summary judgment is appropriate when the documentary evidence filed with the motion "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed.R.Civ.P. 56(c)*. The court's inquiry is to determine "whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in fact of either party." *John Hancock Mutual Life Ins. Co. v. Weisman*, 27 F.3d 500 (10th Cir. 1994), *citing*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact on its claim(s). Rule 56, however, imposes no requirement on the moving party to "support its motion with affidavits or other similar materials negating the opponent's claim." *John Hancock Mutual Life Ins. Co.*, supra, *citing, Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986).

Once the moving party has properly supported its motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials, but must set forth specific facts showing a genuine issue for trial, relying upon the types of evidentiary materials contemplated by Rule 56. *Fed.R.Civ.P. 56(e)*. The court reviews the evidence on summary judgment under the substantive law and based on the evidentiary burden the party will face at trial on the particular claim. *John Hancock Mutual Life Ins. Co. v. Weisman,* 27 F.3d 500, 503 (10th Cir. 1994), *citing, Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986). *See also, Farthing v. City of Shawnee,* 39 F.3d 1131 (10th Cir. 1994).

Here, Defendants point to three basic issues, contending that each, apart from the other, renders the '857 patent invalid.

1. Experimental versus Commercial Use

Applying the Rule 56 standard, the undersigned finds that there remains a genuine issue as to a material fact. A "material fact" is one "that might affect the outcome of the suit under the governing law". *Farthing v. City of Shawnee*, 39 F.3d 1131 (10th Cir. 1994). A "genuine issue" is one where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Farthing v. City of Shawnee. supra (10th Cir. 1994).*

Specifically, the testimony and evidence now before the court reflect the fact that the "device" at issue is not amenable to "laboratory experimentation". To determine whether the questioned device is able to be commercially successful it must, in effect, be placed into operation in the commercial environment. This, of necessity, requires a significant financial investment. That the investment was made, raises a question of

commercial versus "experimental" use, but does not resolve the question whether "a reasonable jury could return a verdict" to the contrary. The nature of the undertaking must itself be taken into account when applying otherwise sterile principles of law.[1]

The evidence is plain that assurances were made to AMOCO that the RADCO unit would function as well as a single-fired coker heater, with the promise of better results for being "double-fired". A jury could reasonably infer that AMOCO was willing to accept a $3.5 million *single*-fired coker heater, hoping that the experimental *double*-fired structure would work as promised. Thus, it is entirely possible that AMOCO was effectively purchasing a *single*-fired coker heater with a *double*-fired configuration, figuring, even at worst, it would still have the functional equivalent of a *single*-fired heater.

Facts giving rise to the question include: "fifty-two tube skin thermocouples... ultimately placed on feedstock tubes..." *(Response Brief, ¶(38.) at p.9)*; a course of dealing between RADCO and AMOCO which allowed RADCO personnel continuing access to the double-fired coker heater after sale and installation *(Response Brief, ¶(42.) at p.10)*; a continuing exchange of operating data on the performance of the double-fired coker heater *(Response Brief, ¶(41.) at p.10)*, among others.

Defendants, however, place too much emphasis on a literal reading of *Paragon*. In *Paragon*, the court addressed a number of factors, part of the *commercial-versus-experiment* analysis. These factors include, sales within a "commercial environment", the inventor's

[1] *History is replete with examples of vast experimental undertakings. Howard Hughes built the world's largest airplane, The Spruce Goose, which only flew once. Billions were spent to launch simians into space, in advance of the first manned spaceflight. Millions were spent in developing the prototypes for the now-accepted F-22 (then the X-22 and X-23) fighter aircraft. Robert Fulton had to build a full-scale version of his steamboat, experimental though it was, and dubbed "Fulton's Folly". The list continues. Sealab, Spacelab, Mir, Biosphere and other such undertakings dot human history. Money alone does not dictate the outcome of experimental versus commercial use, at issue here.*

subjective intent to 'experiment', control by the inventor, and the inventor's disclosure of the experimental nature of the goods. ***Paragon***, *supra*, at 984 F.2d 1187. The issue as resolved by the *Paragon* court, however, is distinctive from that now before this court.

In *Paragon*, the court was faced with an inventor, who in response to litigation, had filed an affidavit in which he averred that the *undisclosed purpose behind some 300 individual sales* was "experimental". *Id.* at 1186. In walking through the 'laundry list' of elements, the court was in reality raising up "straw men" and systematically knocking them back down. It found no "experimental" purpose in a scenario in which 300 individual sales had been made to medical professionals of a medical device accompanied by the representation that **"The Omniflex is the *culmination* of extensive research and *exhaustive clinical testing*."** As the court aptly noted, **"Paragon represented to doctors and their patients that the Omniflex units were fully tested devices."** *Id.* at p.1188.

More to the point, the facts in ***Paragon*** distinguish that case from the case at bar. Here, there were not 300 individual sales. Nor were there affirmative representations to the effect that the double fired delayed coker heater technology was "exhaustively" tested. Nor were multiple devices sold with "a lifetime guarantee", as was the case in *Paragon*.

Instead, a single unit was proposed and fabricated. No such unit had ever been constructed, much less sold, before. The peculiarities of the device compelled its construction and testing be undertaken simultaneously within the confines of an existing oil refinery. No other venue would have sufficed. Standing apart from the refinery, the double fired delayed coker heater might qualify as a form of exotic modern art -- an interesting collection of tubes, pipes and coils, but otherwise entirely functionless. It

attained its life and function only as an integral part of an already extant and operating oil refinery -- not an inexpensive venue, but in no wise equivalent to the "commercial environment" described in *Paragon*. The placement of multiple *commercially unnecessary* sensors, access to the unit after installation,[2] and close monitoring of its performance, coupled with an "understanding" between RADCO and AMOCO as to its "developmental" nature,[3] raises, *under the facts of this case* a genuine issue of material fact, *to-wit:* was the double fired delayed coker heater an "experimental" undertaking?

Accordingly, the undersigned finds that a genuine issue of material fact exists regarding the commercial versus experimental use of the double-fired coker heater installed at the AMOCO refinery at Whiting.[4] Defendants' Motion for Summary Judgment, should, therefore, be denied, on this issue.

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[2] *"Access" to the unit by RADCO personnel, can, under these circumstances, be equated with "control". Clearly, AMOCO bought the unit. Just as plainly, however, AMOCO realized that a double fired unit would at least work as well as single fired unit. The question was, would it work better? Because AMOCO had to "change out" its existing coker heaters in order to accommodate greater volumes, it effectively took a gamble by investing in double fired delayed coker technology. AMOCO acknowledged that it was "new", but also realized that it would function at least as well as the old single fired unit.*

[3] *See, e.g., Plaintiff's "Exhibit 3", Deposition of Shannon Melton, at page 148.*

[4] *Note the approval by the court in UMC Electronics v. U.S. 816 F.2d 647 (Fed.Cir. 1987), of "totality of circumstances" language, citing Western Marine Elecs., Inc. v. Furuno Elec. Co., 764 F.2d 840, 844 (Fed.Cir. 1985):*

> ***Rigid standards are especially unsuited to the on sale provision where the policies underlying the bar, in effect, define it. [citations omitted.] As a result, this court has been careful to avoid erecting rigid standards of section 102(b)...***
>
> *It is a matter of common understanding that the study, practice and application of the law to the world of human endeavor is not scientific. No two set of facts are alike; neither are any two human beings. To apply rigid rules of construction to devices whose construction necessarily requires an undertaking by a third party, such as here, is to ignore the diversity of circumstances which must, in the course of human dealings, be addressed. Neither RADCO nor AMOCO actually knew what would happen when the double fired delayed coker heater technology was applied over time. A key question was whether a double fired delayed coker heater would require as much "down time" as a single fired heater. In order to answer that question, the device actually had to operate. And to answer the question in "real time", it had to operate in a functioning refinery. Only after it had "broken the single fired coker heater records" could one begin to reasonably say that it had been "tested".*

2. Sale by Foster-Wheeler in 1964/Offer for Sale in 1982/1985

Defendants move for summary judgment, asserting that Defendant Foster-Wheeler offered to sell a device all-but-similar to that subject of the instant action prior to September 13, 1987, the "critical date". Foster-Wheeler asks the court to consider its offers of 1982 (to TEXACO) and 1985 (to AMOCO) as a basis for invalidating the '857 patent. See, Defendants' *Opening Brief, at p.20.*

Again, the issue for the court at this stage is whether "the evidence is such that a reasonable jury could return a verdict for the non-moving party."

The court is asked to decide, at this juncture, that the proposals made by Defendant Foster-Wheeler, were effectively the same design as is now subject of the '857 patent. RADCO's statement of disputed facts contain the following assertions:

a. *Foster-Wheeler had not previously, nor has it to this date actually constructed and brought "on-line" a double-fired coker heater;*

b. *Foster-Wheeler's 1964 double-fired design was for a vacuum* heater;

c. *Foster-Wheeler's 1982 proposal contains a 26 different description than that subject of the patent-in-suit.*

The resulting inquiry is straightforward. Are these assertions sufficient, both in and of themselves, or in conjunction with other facts, to defeat the pending Rule 56 Motion? A "material fact" is one "that might affect the outcome of the suit under the governing law". *Farthing v. City of Shawnee*, 39 F.3d 1131 (10th Cir. 1994).

The facts before this court reference both document and deposition testimony. That testimony per se raises a genuine issue of material fact. For example, "Exhibit 17", to Plaintiff's Response (entitled "Process Design Report") at page nine (9), contains the

following statement:

> Two types of coking furnaces will be considered: (1) the typical single fired design, and (2) a new double fired design. The single fired furnace has two banks of tubes, one on each box wall, with one row of floor burners between the banks. The tubes are heated on one side. The double fired furnace has one bank of tubes in the center of each box. There are floor burners on each side of the bank so that the tubes are heated on both sides.
>
> Because of plot plan space limitations, the single fired furnace will be restricted to no more than two boxes. The double fired furnace can be designed with four boxes.
>
> Double fired furnaces have been used extensively in petrochemical and hydrocracking processes, but have not yet been tried in a coking unit. Some of the benefits of the double fired design are expected to be:
>
> a. Flux densities are low, and temperature around the tube are more uniform because the tubes are heated on both sides.
>
> b. With low fluxes, residence time above 800 degrees F, a criteria to measure coking in the furnace, is reduced.
>
> c. Furnace fouling and coking are reduced and run lengths are longer.
>
> d. With four boxes, each box will be capable of being isolated from the other three. This allows one box to be removed from service for -- steam -- air decoking or maintenance while keeping all four drums in service.

"Exhibit 17" was prepared in 1986 by AMOCO personnel. Notable is descriptive use of the word "new" as applied to the double fired coker technology.

"Exhibit 18" is similarly revealing:

> The proposed new coking furnace is of a design previously not utilized in the delayed coking process but widely used in the petrochemical industry for pyrolysis furnaces. Based on discussions with R&TE and representatives of Radco Process Heaters, Inc., it has been determined that the proposed design is feasible both from process and construction standpoints. These design features are recommended to maximize furnace performance, and to minimize construction costs and unit downtime.

There is little doubt, but that the design proposed by RADCO, and later installed, was "new" to the delayed coking process.[5] "Exhibit 16" is confirmatory. Within this December 5, 1985 memorandum, is a discussion of the various proposals received by AMOCO for a "new" delayed coker heater. At page AOC 100003 is found the following observation of Foster Wheeler's prior experience with double fired heaters:

> **Experience level with Double Fired heaters mainly reactor feed heaters. They designed two (2) vacuum furnaces for Chevron at their El Segundo, California Refinery, in operation since 1964.**

While the court cannot do more than note the evidence before it, that evidence is plain: a vacuum heater and a reactor feed heater are not delayed coker heaters.[6]

Accordingly, the undersigned finds that there remains a genuine issue of material fact as to the issues asserted by Foster Wheeler that it has both previously sold such

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[5] *See, e.g., Plaintiff's "Exhibit 7", the attached letter of August 7, 1987 from S.C. Pierce, wherein he refers to the RADCO undertaking using the description, "...the uniqueness of this application..."*

[6] *Defendants include at "Exhibit 19" a July 5, 1985 letter from M. Shannon Melton to Sam Johnson. The letter is evidently among the first contacts RADCO had with AMOCO in an attempt to persuade AMOCO that double fired technology can be applied to the delayed coking process. Defendants point to the language at page three of that letter:*

> *...double firing is a well documented and well tested solution to virtually every problem that delayed coking presented.*

The undersigned notes that the sentence at issue is one which must be viewed in context with the surrounding words. Says Mr. Melton in the preceding paragraph:

> *In addition to the theoretical advantages already discussed...[t]his technique can be demonstrated as highly superior... (Emphasis added.)*

And in the sentences following:

> *There is no known negative aspect to the application of double firing to delayed coking. (Emphasis added.)2*

Plainly, Melton, an engineer, is describing a prospective application. Specifically, he is describing the application of a known principle, i.e., "double firing", to a known process, i.e., "delayed coking", asserting that the marriage of the two would be a unique solution to the problems previously encountered in application of single fired technology. He is not describing previously built or designed double fired delayed coker heaters. There were, in fact, no such units in existence.

heaters, and that it has designed and offered for sale such a heater.[7] Defendants' Motion for Summary Judgment should be denied on these issues as well.

II. Unenforceability

Defendants assert that the conduct of counsel, in prosecuting the '857 Patent Application, was "inequitable". As a result, they contend that the '857 Patent is unenforceable. *See, Defendants' Opening Brief at p. 12 et seq.*

The facts in this case speak for themselves, giving life to the law cited by both parties. In this case, the original patent application was filed by Mr. Edward Bowman. In his application, and in surrounding supporting documents (a letter and memorandum), Mr. Bowman affirms his knowledge of the AMOCO sale. He also acknowledges that "***you have good arguments that at least until October of 1987, or at least about until the end of June 1987, the use was, in fact, a necessary period of testing.***" *Defendants' "Exhibit 7".*

At issue, then, is the question raised by Defendants, that information was deliberately withheld from the Patent Office with intent to mislead.

Defendants cite *Paragon, supra,* at 984 F.2d 1192. A close reading of the court's holding at page 1192 of the reported opinion discloses the following:

> A party charging inequitable conduct may make a *prima facie* case by showing an unexplained violation of the duty of candor. In a responsive denial, the patentee may set forth facts which show that under the particular circumstances as the applicant and /or his attorney perceived them, an inference of wrongful intent should not be drawn. Facts showing, for example, their good faith mistake in the

---

[7] *Indeed, it would appear that RADCO has successfully rebutted Foster-Wheeler's assertion that it had designed and built double fired heaters of a like kind, purpose and design. The submissions before the court indicate that double fired technology existed in other realms, but had never before been applied to the delayed coking process. Foster Wheeler had utilized double fired technology, but had not applied it to the delayed coking process. The submissions before the court make it plain that there is a distinctive difference between different types of heaters, even those using similar technologies. The processes employed are different, as are the physics of the device, i.e., different temperatures, flow rates, flux etc. Foster Wheeler's proposed design was distinctive from that proposed by RADCO. Plaintiff's "Exhibit 16", referenced above, makes it clear that AMOCO noted a significant difference between the design proposals. This, in and of itself, creates a genuine issue of material fact.*

law or the facts or mere negligence may be enough to raise a genuine dispute. *(Emphasis added.)*

The *Paragon* court went on to explain that absent explanation, evidence of a "knowing failure to disclose" "supports an inference that the inventor's attorney intended to mislead the PTO." In that case, however, as noted earlier, more than 300 individual sales were made of a medical instrument prior to the critical date. The sales were made "with a lifetime guarantee", accompanied by the assertion that the devices had been "exhaustively clinically tested". Faced with this scenario, the *Paragon* court had little choice but to conclude that the attorney's protestation regarding his failure to disclose did not raise a genuine issue of material fact. This was especially cogent given that the attorney admitted that he had, in fact, "seen the promotional material and knew that the sales were unrestricted and that no testing records were maintained." *Paragon, supra,* at 984 F.2d 1193.

Here, the facts are far different. One attorney started the process. He then left the firm, to be replaced by another. In his opening letter, Mr. Bowman acknowledges his belief that disclosure should be considered, but also noted that a good faith argument can be made for experimental use, perhaps even as late as October of 1987. The attorney was not faced with advertising blatantly commercial in its presentation.

There were not 300 individual sales.

No promotional materials were widely circulated to the public claiming a "lifetime guarantee" and "exhaustive clinical testing".

To the contrary, AMOCO and RADCO acknowledged that double fired technology was a "new" use in the delayed coking process.

In sum, there is indeed a genuine issue of material fact. This conclusion is supported in part by the court's foregoing conclusion, that a genuine issue of material fact exists regarding the question of "experimental use". Distinctive from *Paragon*, there is no "overriding pattern of misconduct" by Plaintiff's attorneys. To find "culpable intent" on the record before it, the court would be required to ignore its own conclusions, that there is, indeed, a genuine issue of material fact as to the question of experimental use. A lawyer who makes a "judgment call" against disclosure, ***given the facts of this case***, is not one, who absent more, is actively attempting to mislead. The decision was a "judgment call", arguably made in good faith. It is not beyond the facts of this case to suppose that a jury could not "return a verdict for the nonmoving party."

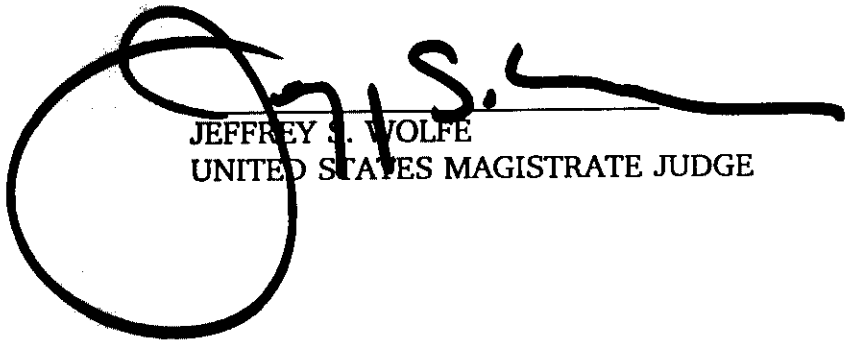
Given the foregoing, the undersigned does not find facts here, as were present before the court in *Paragon*. A genuine issue of material fact remains as to the question of counsel's intent and conduct in prosecuting the Patent without disclosing the prior single sale.

Accordingly, the undersigned recommends that Defendants' Motion for Summary Judgment on the question of unenforceability also be denied.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.[8]

[8] *See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).*

Dated this 17th day of March, 1995.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JAMES JACKSON,

Plaintiff,

vs.

ROB EDEN, et al.,

Defendants.

Case No. 94-C-111-BU

JUDGMENT

This matter came before the Court upon the Motion for Summary Judgment filed by Defendants Rob Eden, Emmett Eads and the Oklahoma Department of Human Services and the Motion for Summary Judgment filed Defendants Rob Eden and Emmett Eads, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Rob Eden, Emmett Eads and the Oklahoma Department of Human Services, against Plaintiff, James Jackson.

DATED at Tulsa, Oklahoma, this 16 day of March, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES JACKSON,)
)
Plaintiff,)
)
vs.) Case No. 94-C-111-BU
)
ROB EDEN, et al.,)
)
Defendants.)

ORDER

This matter comes before the Court upon the motion of Defendants, Rob Eden and Emmett Eads, for summary judgment pursuant to Rule 56, Fed. R. Civ. P. Plaintiff, James Jackson, has responded to the motion and Defendants have replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

In February, 1992, Plaintiff, a black male, applied for the position of social work assistant for the Oklahoma Department of Human Services in Washington County, Oklahoma. Plaintiff was not selected for the position. Plaintiff thereafter commenced this action against Defendants, Rob Eden, Emmett Eads and the Oklahoma Department of Human Services, pursuant to 42 U.S.C. § 1981, alleging that he was not selected for the social work assistant position because he was black and/or because he was male. In an Order dated January 20, 1995, this Court entered summary judgment in favor of Defendant, Oklahoma Department of Human Services, and Defendants, Rob Eden and Emmett Eads, in their official capacity, on Plaintiff's section 1981 claims for race and sex discrimination

and entered summary judgment in favor of Defendants, Rob Eden and Emmett Eads, in their individual capacity, on Plaintiff's section 1981 claims for sex discrimination. As to Plaintiff's section 1981 claims for race discrimination, the Court granted summary judgment to the extent Plaintiff sought relief under a disparate impact theory but denied summary judgment to the extent Plaintiff sought relief under a disparate treatment theory. The Court, however, granted Defendants leave to file another summary judgment motion addressing the disparate treatment theory. On February 6, 1995, Defendants filed the instant motion.

Initially, the Court notes that Plaintiff, in response to Defendants' motion, re-urges his position that Defendant, Oklahoma Department of Human Services, and Defendants, Rob Eden and Emmett Eads, in their official capacity, are not immune from suit under the Eleventh Amendment. The Court, however, again finds that Plaintiff's position is without merit. Defendant, Oklahoma Department of Human Services, is a state agency. Defendants, Rob Eden and Emmett Eads, are officials of that agency. Absent a waiver or a congressional abrogation of immunity, a state and its agencies are immune from suit under the Eleventh Amendment. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984); Ramirez v. Oklahoma Dept. of Mental Health, 41 F.3d 584, 588 (10th Cir. 1994). State officials who are sued for damages in their official capacity are also immune from suit as a judgment against the public servants in their official capacity imposes liability on the entity they represent.

Kentucky v. Graham, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107, 87 L.Ed.2d 114 (1985). The State of Oklahoma has not waived its Eleventh Amendment immunity. Okla. Stat. tit. 51, § 152.1(B); Nichols v. Dept. of Corrections, 631 P.2d 746, 749-51 (Okla. 1981). Nor has Congress abrogated Eleventh Amendment immunity in 42 U.S.C. § 1981. Freeman v. Michigan Dept. of State, 808 F.2d 1174, 1178-79 (6th Cir. 1987); Morris v. State of Kan., Dept. of Revenue, 849 F.Supp. 1421, 1426 (D.Kan. 1994).[1] Therefore, the Court finds that Defendant, Oklahoma Department of Human Services, and Defendants, Rob Eden and Emmett Eads, in their official capacity, are immune from suit on Plaintiff's section 1981 claims pursuant to the Eleventh Amendment.

As set forth in the Court's Order of January 20, 1995, the Supreme Court enunciated a scheme of proof for establishing intentional racial discrimination under a disparate treatment theory in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the McDonnell Douglas analysis, a plaintiff must first establish a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802. In the January 20, 1995 Order, the Court, construing Plaintiff's pleadings liberally, found that Plaintiff had sufficiently pleaded a prima facie case. Satisfaction of the

[1]Plaintiff has argued in his brief that Defendant, Oklahoma Department of Human Services, has waived Eleventh Amendment immunity by receiving federal assistance and by participating in federal programs. However, the mere receipt of federal funds and participation in federal programs cannot establish a waiver or a consent to suit in federal court. Atascadero State Hospital v. Scalon, 473 U.S. 234, 246, 105 S.Ct. 3142, 3149, 87 L.Ed.2d 171 (1985).

prima facie case creates a presumption of discrimination. St. Mary's Honor Center v. Hicks, _____ U.S. _____, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993).

Once the plaintiff has established a prima facie case, the burden of production shifts to the defendant to rebut the presumption. Id. A defendant can meet this burden by articulating a legitimate, nondiscriminatory reason for the employment decision. Id. The defendant's explanation of its legitimate reason must be clear and reasonably specific. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981).

Defendant Rob Eden's affidavit shows that the successful white applicant for the social work assistant position was selected because she was better qualified than Plaintiff. Mr. Eden's affidavit indicates that the successful white applicant was better qualified since she possessed a degree in psychology which was a discipline related to social work, her responses to interview questions were judged superior to other applicants and her work experience was more readily transferable to the position of social work assistant. The Court concludes that Defendants' reason for their employment decision is specific and reasonable and is sufficient to rebut the presumption of discrimination created by Plaintiff's prima facie case.

The burden then shifts back to the plaintiff to show that the defendant's proffered reason was not the real reason for its employment decision but was a pretext for discrimination.

McDonnell Douglas, 411 U.S. at 804. This burden merges with the ultimate burden of persuading the court that the plaintiff has been the victim of intentional racial discrimination. Burdine, 450 U.S. at 256. The plaintiff may meet this burden directly by showing that racial discrimination actually motivated the defendant, or indirectly by demonstrating that the defendant's reason is unworthy of belief. Drake v. City of Fort Collins, 927 F.2d 1156, 1160 (10th Cir. 1991). In a summary judgment setting, the plaintiff must raise a genuine factual question as to whether the defendant's proffered reason is pretextual. Id.

In the instant case, the Court concludes that Plaintiff's disparate treatment claim must fail because he has not presented sufficient evidence to satisfy his burden. Plaintiff has presented no direct evidence of discriminatory motive on Defendants' part, nor has he disputed Defendants' evidence in regard to their proffered reason for their employment decision. He has merely argued that the qualifications of the successful white applicant do not establish that she was more qualified for the position than he. However, Plaintiff's subjective evaluation of those qualifications, does not prove discriminatory intent. Plaintiff has also attempted to prove that he was more qualified than the successful applicant by showing that he had a longer work history and that he had a good interview. The Court finds that this evidence does not prove that Plaintiff was more qualified than the successful applicant.

In addition, Plaintiff has failed to present other indirect evidence which creates a doubt as to Defendants' motive in hiring

the white applicant for the social work assistant position. Plaintiff has submitted evidence to demonstrate that black individuals were underrepresented in the workforce of the Department of Human Services in Washington County, Oklahoma at the time Plaintiff applied for a position. This evidence, however, is insufficient to establish a jury question of discriminatory intent on the part of the individual Defendants. The evidence presented does not show that these particular Defendants were responsible for all of the hiring decisions for the Washington County office. However, even if the evidence did show that Defendants were responsible for the hiring decisions, it reveals no disparity of treatment of black individuals. According to the census data provided by Plaintiff, the black population made up 3.3% of the total population in Bartlesville, Oklahoma. Other evidence presented, however, indicates that black individuals made up 5% of the workforce of the Washington County office.[2] Since the percentage of black individuals in the Washington County workforce exceeded the general black population, black individuals were not underrepresented in the Washington County office.

Plaintiff, in his brief, has argued that the black population in Tulsa, Oklahoma of 13.5% should be included in determining whether the black population was being underrepresented in the

[2]Plaintiff has submitted evidence which indicates that in 1992, 1993 and 1994, the Washington County office hired one black individual and 23 white individuals. The Court finds that this evidence does not raise an issue of fact as to whether the Washington County office had a 5% black workforce at the time Plaintiff applied for the job.

Washington County office since applications were taken from Tulsa residents. Plaintiff states that the inclusion of Tulsa's black population makes for an average of 8.4%. Plaintiff has provided no authority to support such argument. Nonetheless, the Court finds that the evidence does not show a significant disparity between the Washington County office and the general black population so as to establish discriminatory motive or intent on the part of the individual Defendants.

Plaintiff has further attempted to establish discriminatory intent by showing that Defendant, Oklahoma Department of Human Services, admitted in its FY 93 Affirmative Action Program that it had a history of underutilizing minorities in its labor force. The Court, however, again concludes that such evidence does not establish a question of fact about the individual Defendants' motive. Furthermore, the Court finds that the evidence does not establish that the Washington County office underutilized black individuals.

Having reviewed all of the evidence submitted by Plaintiff, the Court finds that Plaintiff has failed to present sufficient evidence to raise factual questions about Defendants' motive in hiring the white applicant for the social work assistant position. Because Plaintiff has failed to offer sufficient evidence to meet his ultimate burden of showing intentional discrimination, the Court finds that summary judgment is appropriate. See, Durham v. Xerox Corporation, 18 F.3d 836 (10th Cir. 1994).

Based upon the foregoing, the Court GRANTS Defendants Eden and

Eads' Motion for Summary Judgment (Docket No. 13). Judgment shall issue forthwith.

ENTERED this 16th day of March, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WINFORD MARTIN,

Petitioner,

vs.

STATE OF OKLAHOMA, COUNTY OF, TULSA,

Respondents.

No. 95-C-0082-BU

ORDER

On February 7, 1995, the Court construed this petition for a writ of habeas corpus as a pre-trial habeas action pursuant to 28 U.S.C. § 2241(c)(3) because the Petitioner had not yet been convicted. The Respondent has since moved to dismiss for failure to exhaust state remedies. The Petitioner has not responded.

Petitioner's failure to respond to Respondent's motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.[1] In any event the Court concludes that Respondent's motion to dismiss for failure to exhaust state remedies should be granted. Petitioner's speedy trial issue can and must be considered first by the state courts. See Capps v. Sullivan, 13 F.3d 350, 354 n.2 (10th Cir. 1993) ("'federal courts should abstain from the exercise

[1]Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

of . . . jurisdiction if the issues raised in the [2241] petition may be resolved either by trial on the merits in the state court or by other state procedures . . .'" (quoting Dickerson v. Louisiana, 816 F.2d 229, 226 (5th Cir.), cert. denied, 484 U.S. 956 (1987)).

ACCORDINGLY IT IS HEREBY ORDERED that:

(1) Respondent's motion to dismiss for failure to exhaust state remedies (doc. #4) is **granted**; and

(2) The petition is **dismissed without prejudice**.

SO ORDERED THIS 15 day of March, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE MAR 17 1995

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EARNEST WHITE;
CLARENCETTA WHITE;
STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION;
ROLLING OAKS AMENDED OWNERS' ASSOCIATION, INC., aka Rolling Oaks Owners Association, Inc.;
CITY OF SAND SPRINGS, Oklahoma
COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No.94-C-1148-K

FILED

MAR 16 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16 day of March, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, CITY OF SAND SPRINGS, Oklahoma, appears not having previously filed a Disclaimer; and the Defendants, EARNEST WHITE, CLARENCETTA

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

WHITE and ROLLING OAKS AMENDED OWNERS' ASSOCIATION, INC., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, EARNEST WHITE, signed a Waiver of Summons on January 11, 1995; that the Defendant, CLARENCETTA WHITE, signed a Waiver of Summons on January 11, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on December 16, 1994, by Certified Mail; that Defendant, CITY OF SAND SPRINGS, Oklahoma, was served a copy of Summons and Complaint on December 16, 1994, by Certified Mail; and that Defendant, ROLLING OAKS AMENDED OWNERS' ASSOCIATION, INC., signed a Waiver of Summons on January 7, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on December 29, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed Its Answer on January 19, 1995; that the Defendant, CITY OF SAND SPRINGS, Oklahoma, filed Its Disclaimer on January 19, 1995; and that the Defendants, EARNEST WHITE, CLARENCETTA WHITE and ROLLING OAKS AMENDED OWNERS' ASSOCIATION, INC., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seven (7), Block Seven (7), ROLLING OAKS AMENDED, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on December 31, 1985, Roger Nielsen, executed and delivered to FIRST SECURITY MORTGAGE COMPANY, his mortgage note in the amount of $79,998.00, payable in monthly installments, with interest thereon at the rate of Eleven percent (11%) per annum.

The Court further finds that as security for the payment of the above-described note, Roger Nielsen, a single person, executed and delivered to FIRST SECURITY MORTGAGE COMPANY, a mortgage dated December 31, 1985, covering the above-described property. Said mortgage was recorded on January 9, 1986, in Book 4917, Page 1416, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 2, 1986, FIRST SECURITY MORTGAGE COMPANY, assigned the above-described mortgage note and mortgage to ASSOCIATES NATIONAL MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on February 6, 1986, in Book 4923, Page 824, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 30, 1989, ASSOCIATES NATIONAL MORTGAGE CORP., assigned the above-described mortgage note and mortgage to FLEET MORTGAGE CORP. This Assignment of Mortgage was recorded on July 5, 1989, in Book 5192, Page 1554, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 20, 1990, FLEET MORTGAGE CORP., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of

Mortgage was recorded on July 27, 1990, in Book 5267, Page 693, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 28, 1989, Roger Nielsen, a single person, granted a general warranty deed to the Defendants, EARNEST WHITE and CLARENCETTA WHITE, Husband and Wife. This deed was recorded with the Tulsa County Clerk on May 2, 1989, in Book 5181 at Page 138 and the Defendants, EARNEST WHITE and CLARENCETTA WHITE, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on June 22, 1990, the Defendants, EARNEST WHITE and CLARENCETTA WHITE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on July 8, 1991, December 5, 1991, January 13, 1992, June 9, 1992, August 27, 1992 and April 20, 1993.

The Court further finds that the Defendants, EARNEST WHITE and CLARENCETTA WHITE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, EARNEST WHITE and CLARENCETTA WHITE, are indebted to the Plaintiff in the principal sum of $114,940.08, plus interest at the rate of 11 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action .

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by

virtue of ad valorem taxes in the amount of $781.00, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of State Taxes in the amount of $3,786.53 which became a lien on the property as of April 12, 1989; a lien in the amount of $670.42 which became a lien on the property as of July 7, 1989; a lien in the amount of $98.99 which became a lien on the property as July 7, 1989; and a lien in the amount of 1,266.68 which became a lien on the property as of October 6, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, EARNEST WHITE, CLARENCETTA WHITE and ROLLING OAKS AMENDED OWNERS' ASSOCIATION, INC., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, CITY OF SAND SPRINGS, Oklahoma, Disclaims any right, title or interest in the real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, EARNEST WHITE

and CLARENCETTA WHITE, in the principal sum of $114,940.08, plus interest at the rate of 11 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.57 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $781.00, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $5,822.62, plus accrued and accruing interest, for state taxes, plus costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; CITY OF SAND SPRINGS, Oklahoma; EARNEST WHITE; CLARENCETTA WHITE; and ROLLING OAKS AMENDED OWNERS' ASSOCIATION, INC., have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, EARNEST WHITE and CLARENCETTA WHITE, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell

according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $781.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $5,822.62, plus accrued and accruing interest, state taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any

right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED:

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Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C-1148-K

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DWIGHT G. WOFFORD;
JUDY WOFFORD;
STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION;
COUNTY TREASURER, Tulsa
County, Oklahoma; BOARD OF
COUNTY COMMISSIONERS, Tulsa
County, Oklahoma,

Defendants.

Civil Case No. 94-C-1132-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16 day of March, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, DWIGHT G. WOFFORD and JUDY WOFFORD, appear not, but make default.

The Court further finds that the Defendants, DWIGHT G. WOFFORD and JUDY WOFFORD, are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, DWIGHT G. WOFFORD, was

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

served a copy of Summons and Complaint on January 19, 1995 and signed a Waiver of Summons on January 19, 1995; that the Defendant, JUDY WOFFORD, was served a copy of Summons and Complaint on January 19, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on December 12, 1994, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on December 27, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on January 11, 1995; and that the Defendants, DWIGHT G. WOFFORD and JUDY WOFFORD, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT THIRTEEN (13), BLOCK FIVE (5), VANDIVERS RESUBDIVISION TO THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT NO. 1928.

The Court further finds that this is a suit brought of the further purpose of judicially determine the death of Karen A. Wofford, and judicially terminate the joint tenency between Dwight G. Wofford and Karen A. Wofford.

The Court further finds that DWIGHT G. WOFFORD and KAREN A. WOFFORD, became the record owners of the real property

involved in this action by virtue of a certain General Warranty Deed dated, September 25, 1989, from Cecil E. Maddox and Mary A. Maddox, husband and wife, as joint tenants and not as tenants in common, on the death of one the survivor, the heirs and assigns of the survivor, to take the entire fee simple title, such General Warranty Deed was filed of record on October 19, 1989, in Book 5214, Page 1561, in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that Karen A. Wofford died on November 28, 1990, while seized and possessed of the real property being foreclosed. The Certificate of Death No. 26441 was issued by the Oklahoma State Department of Health certifying Karen A. Wofford's death.

The Court further finds that on September 25, 1989, the Defendant, DWIGHT G. WOFFORD and Karen A. Wofford, now Deceased, executed and delivered to FIRST SECURITY MORTGAGE COMPANY, their mortgage note in the amount of $44,505.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9½%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, DWIGHT G. WOFFORD and Karen A. Wofford, now Deceased, executed and delivered to FIRST SECURITY MORTGAGE COMPANY a mortgage dated September 25, 1989, covering the above-described property. Said mortgage was recorded on October 19, 1989, in Book 5214, Page 1562, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 25, 1989, FIRST SECURITY MORTGAGE COMPANY, assigned the above-described

mortgage note and mortgage to MORTGAGE CLEARING CORPORATION. This Assignment of Mortgage was recorded on October 19, 1989, in Book 5214, Page 1567, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1991, MORTGAGE CLEARING CORPORATION, assigned the above-described mortgage note and mortgage to TRIAD BANK, N.A. This Assignment of Mortgage was recorded on December 31, 1991, in Book 5371, Page 947, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 2, 1992, Triad Bank, N.A., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on March 8, 1993, in Book 5482, Page 539, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 12, 1993, the Defendants, DWIGHT G. WOFFORD and JUDY WOFFORD, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendant, DWIGHT G. WOFFORD, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, DWIGHT G. WOFFORD, is indebted to the Plaintiff in the principal sum of $51,098.87, plus interest at the rate of 9½ percent per annum from August 3, 1994 until judgment, plus interest thereafter at the legal rate until

fully paid, and the costs of this action.

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Karen A. Wofford, and to a judicial termination of the joint tenancy of the Defendant, Dwight G. Wofford and Karen A. Wofford, now deceased.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $456.00, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $8.00 which became a lien on the property as of June 26, 1992; a lien in the amount of $2.00 which became a lien on the property as of June 25, 1993; and a lien in the amount of $2.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state taxes in the amount of $282.65 which became a lien on the property as of March 5, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, DWIGHT G. WOFFORD and JUDY WOFFORD, are in default, and have no right,

title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, DWIGHT G. WOFFORD, in the principal sum of $51,098.87, plus interest at the rate of 9½ percent per annum from August 3, 1994 until judgment, plus interest thereafter at the current legal rate of 6.57 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of Karen A. Wofford be and the same is hereby judicially determined to have occurred on November 28, 1990, in the City of Tulsa, County of Tulsa, State of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of the Defendant, Dwight G. Wofford and Karen A. Wofford, in the above-described real property be and the same is

hereby judicially terminated as of the date of the death of Karen A. Wofford on November 28, 1990.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $456.00, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $12.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment in rem in the amount of $282.65, plus accrued and accruing for state taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, DWIGHT G. WOFFORD and JUDY WOFFORD, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, DWIGHT G. WOFFORD, to satisfy the judgment in rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $456.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $282.65, plus accrued and accruing interest, state taxes which are currently due and owing.

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $12.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that

pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

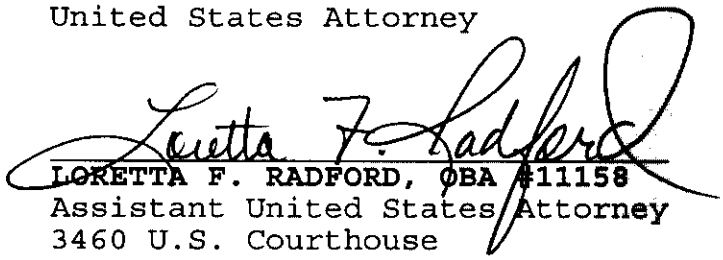
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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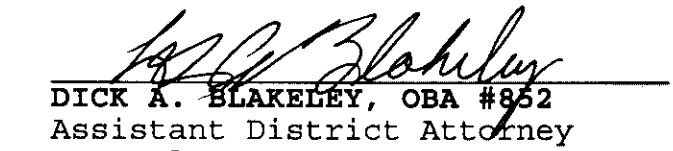

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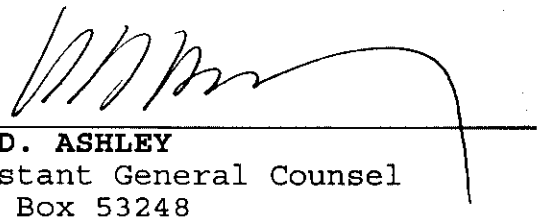

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Judgment of Foreclosure
Civil Action No. 94-C-1132-K

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MYRNA DANIELS O/B/O SHANIQUA HUDSON, a minor,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 93-C-523-E

ORDER

Myrna Daniels brings this claim for Children's Supplemental Security Income Disability Benefits on behalf of her minor daughter, Shaniqua Hudson. There is no dispute that Hudson has exhausted her administrative remedies, and is properly before this court.

Hudson, who was 11 at the time of her administrative hearing in 1992, claims to be disabled as a result of an impairment to her left leg and left arm, which has been diagnosed as "cerebral palsy syndrome with spastic left hemiplegia. . . severe tendoachilles contracture with rocker bottom deformity, left foot." She claims that she can only walk for short periods of time, walks more slowly than other children, and suffers from severe disabling pain. She claims she cannot bend her left arm, can only walk or stand for 30 minutes at a time, and suffers pain which causes her to need to rest.

Both parties agree that, under the change in law as a result of Sullivan v. Zebley, 493 U.S. 521 (1990), Hudson is disabled if

she suffers from an impairment of "comparable severity" to one that would disable an adult. In determining comparable severity, the SSA considers the claimant's ability to "grow, develop, or mature physically, mentally, or emotionally and thus to engage in age-appropriate activities of daily living in self care, play and recreation, school and academics, vocational settings, peer relationships, or family life." 20 C.F.R. §416.924(a)(2). The Sequential Process for evaluating a Child's disability is:

> Step 1: Is the child engaged in substantial gainful activity?
>
> Step 2: If not, does the child have a severe impairment or combination of impairments?
>
> Step 3: If so, does the child's impairment, or combination of impairments, meet or equal a listing?
>
> Step 4: If not, does the child have an impairment or comparable severity to an impairment that would disable an adult?

20 C.F.R. §416.924(a-f).

After applying this analysis, the ALJ found that the claimant is not engaging in substantial gainful activity; has left hemiparesis, left hamstring and tendo-achilles tightness, and contracture with 10 degrees reduced dorsiflexion and rocker bottom deformity of the left foot; that the claimant does not have a listed impairment; and that the claimant does not have an impairment or combination of impairments which is functionally equivalent to any listed impairment.

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable

mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record of if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

Claimant's first objection to the Secretary's denial of her application is that the ALJ erred in not finding that she had a listed impairment. The government argues that Claimant's leg impairment does not meet or equal §101.03A of the Appendix 1 Listing of Impairments, which requires that Claimant present objective medical evidence that she has a deficit of musculoskeletal function due to deformity or musculoskeletal disease, and her walking is markedly reduced in speed or distance despite orthotic or prosthetic devices. 20 C.F.R. Part 404, Subpart P, Appendix 1, §101.03A. It asserts that Claimant does not meet or equal the requirements of §101.03A because she is, by her own testimony able to walk thirty minutes at a time, play soccer

twice a week with her classmates, and does not need an orthotic or prosthetic device to walk. The government also relies on the report of Claimant's principal to the effect that Claimant's leg impairment did not have any apparent effect on her activities and was not noticeable; and Claimant was able to participate in all the physical education activities and "has always participated completely with the rest of the class." The Court finds that the evidence supports the conclusion that Claimant's walking is not "markedly reduced in speed or distance," and therefore does not have an impairment which meets or equals §101.03A.

Claimant also asserts that the ALJ erred in failing to evaluate her subjective complaints of pain under the standard set forth in Luna v. Bowen, 834 P. 2d 161, 164 (10th Cir. 1987). The government argues that the ALJ properly analyzed Claimant's subjective complaints of pain pursuant to Luna, when he noted that she did not seek regular treatment for pain, did not take any medication other than Advil, participated in many activities, including playing soccer, and successfully completed her school assignments.

Under Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), the decision maker must consider all of the evidence presented to determine whether the Claimant's pain is disabling, including medical data, other objective indications of the degree of the pain, and subjective accounts of the severity of the pain. Id. at 163. Factors to be considered include the Claimant's persistent attempts to find relief from pain and his willingness to try

prescribed treatment, regular use of crutches or a cane, regular contact with a doctor, the possibility that psychological disorders combine with physical problems, the Claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Id. at 165-66. Although Claimant complains of pain, the evidence reveals that she does not take prescription medication for her pain, does not see a doctor with any frequency at this time, is not significantly limited in her daily activities, and does not use a crutch or a cane. The evidence supports the AL's finding that Claimant does not suffer from disabling pain.

Lastly, Plaintiff argued at the hearing, for the first time, that the ALJ did not make formal findings regarding step four, i.e., that Claimant does not have an impairment of comparable severity that would disable an adult. The government agrees that no specific finding regarding step four was made, but asserts that a finding regarding step four was "implicit" in the findings of the ALJ. The Court agrees. The ALJ made the finding that "[t]he claimant was not under a disability as defined in the Social Security Act at any time through the date of this decision." Moreover within the evaluation of the evidence, the ALJ stated:

> Moreover, under section 416.924(f), when the impairment is severe but does not meet or equal on severity any listed impairment in Appendix 1, the undersigned is required to assess the impact of the impairment(s) on the claimant's overall ability to function independently, appropriately, and effectively, in an age appropriate manner. This assessment is to determine whether the claimant has an impairment(s) of comparable severity to an impairment(s) that would prevent an adult from engaging in substantial gainful activity. However, if the impairment(s) is not comparable in severity to an impairment that would make an adult disabled, it would

not be considered disabling for a child."

The ALJ then proceeded to make the assessment he discussed, and conclude that the Claimant was not disabled within the meaning of the Act. The Court does not find any reason to remand for a more specific finding.

The ALJ properly considered the objective medical evidence, and the subjective evidence such as Plaintiff's activities, and his determination is supported by substantial evidence. Plaintiff's appeal is denied.

IT IS SO ORDERED THIS 15th DAY OF ~~FEBRUARY~~ March, 1995.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARION HUNTER, JR.,

Plaintiff,

vs. No. 93-C-682-E

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

O R D E R

Now before the Court is the appeal of the plaintiff Marion Hunter, Jr., to the Secretary's denial of disability benefits.

Marion Hunter (Hunter) filed applications for Social Security Benefits and Supplemental Security Income in September, 1987, alleging disability since October 2, 1982. These applications were denied, and Plaintiff did not pursue the matter any further. He filed applications for benefits and supplemental income again in 1992, alleging the same date of disability. He claims to have multiple impairments including a sleep disorder, vision problems, hypertension, swollen feet, a gunshot wound and two knife wounds.

Claimant was born on April 13, 1941, and completed the fifth-grade. He has worked at a brick manufacturing company, blending brick, as a maintenance man at apartment complexes, and as a machinist. He has not engaged in substantial gainful activity since 1981. He has been diagnosed with essential hypertension.

Legal Analysis

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the

review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)

2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).

3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).

4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).

5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes V. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record of if there is a mere

scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

The Administrative Law Judge found that Hunter's 1987 applications were administratively final, and no further consideration could be given those applications. He denied Hunter's 1992 applications at the second step, finding that "Mr. Hunter has clearly failed to sustain the burden of establishing that he has a severe impairment or combination of impairments, considered singularly or in combination, which would significantly affect his ability to engage in a full range of basic work-related activities, to include heavy manual labor on a sustained basis." He noted that no physician had placed any exertional or nonexertional limitations on claimant's ability to engage in work-related activities, and that claimant was not credible with respect to his multiple subjective complaints. He noted that claimant had been diagnosed with essential hypertension, but that the medical records revealed it was well controlled with medication and there was no evidence of end organ damage.

Claimant brought this appeal, arguing that his impairments are more than slight and that they interfere with his ability to perform basic work activities. He argues that he has been diagnosed with essential hypertension and that the other problems he suffers from "may well stem from the medication he must take to control his hypertension." He claims that these problems are therefore "abnormalities . . . demonstrable by medically acceptable clinical and laboratory diagnostic techniques," and must be considered in determining whether he has severe or slight impairments. He asserts that the ALJ rejected his complaints because he found no abnormality from which they might result, but that the ALJ "failed to consider whether Mr. Hunter's complaints could be caused by his medication, even though objective evidence should have raised the issue."

The Secretary argues that disability must be established by medical evidence consisting of signs, symptoms and laboratory findings and may not rest solely of claimant's statement of symptoms. Defendants note that Plaintiff's impairments were never confirmed by any diagnostic testing, and argue that narcolepsy, Plaintiff's most significant impairment, was not mentioned by him during his incarceration at the Oklahoma Department of Corrections from September, 1984 to June, 1987, or while in the Tulsa county Jail from June 19, 1991 to December 23, 1991, despite the fact that he was seen two to four times a week by a physician. Defendants also argue that there is no evidence that Plaintiff is experiencing side effects from his hypertension medication.

In Bowen v. Yuckert, 107 S.Ct. 2287 (1987), the Supreme Court upheld the Secretary's authority to "require disability claimants to make a threshold showing of medical severity." Both parties agree the medically severe impairments must result from "abnormalities . . . demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. §423(d)(1)(A). The Court finds that Plaintiff did not meet his burden of proof on this issue. Plaintiff's medical records do not demonstrate impairments such as those complained of by Plaintiff or that are medically severe. Moreover, this is not a situation where Plaintiff is deprived of his ability to prove his impairments because of lack of finances to seek medical treatment. The record reveals that Plaintiff has in fact sought medical treatment, from among other places, Morton Health Center, the Tulsa County Jail, and the Oklahoma Department of Corrections. None of these records substantiate any impairment that is medically severe other than the hypertension which is taken care of by medication.

Plaintiff's appeal is denied.

IT IS SO ORDERED THIS 15th DAY OF March, 1995.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIE LEONARD GRANT,

Petitioner,

vs.

RONALD J. CHAMPION, et al.,

Respondent.

No. 94-C-1031-E

ORDER

At issue before the Court is Respondent's motion to dismiss this petition for a writ of habeas corpus as a mixed petition pursuant to Rose v. Lundy, 455 U.S. 509 (1982). Respondent argues that the Petitioner has not presented to the Oklahoma Court of Criminal Appeals one of his grounds for relief (i.e., ineffective assistance of his appellate counsel). The Petitioner has not responded.

In Rose v. Lundy, 455 U.S. 509 (1982), the United States Supreme Court held that a federal district court must dismiss a habeas corpus petition containing exhausted and unexhausted grounds for relief. The Court stated:

> In this case we consider whether the exhaustion rule in 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Id. at 510 (emphasis added).

Petitioner's failure to respond to Respondent's motion

constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C. [1] In any event, the Court concludes that the Petitioner has not exhausted his state remedies as to all of his grounds for relief. Accordingly, Petitioner's application for a writ of habeas corpus is subject to dismissal as a mixed petition. See Rose, 455 U.S. at 510.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss (doc. #6) is **granted, and** the petition for a writ of habeas corpus is **dismissed without prejudice** as a mixed petition.

SO ORDERED THIS 14th day of March, 1995.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

[1]Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELVIN BATTIEST,

Petitioner,

vs. No. 94-C-960-K

RON CHAMPION,

Respondent.

ORDER

At issue before the Court in this habeas corpus action pursuant to 28 U.S.C. § 2254, is Respondent's motion to dismiss the petition as successive under Rule 9(b) of the Rules Governing Section 2254 cases. Respondent argues that the ineffective-assistance-of-counsel claim which Petitioner raises in the present petition is successive as it was considered on the merits in an earlier petition for a writ of habeas corpus in the Eastern District of Oklahoma. Although the Petitioner concedes that the Eastern District previously reviewed the effective assistance of his trial and appellate counsel, he alleges that there are still fundamental grounds of ineffective assistance for this Court to review.

I. BACKGROUND

In July 1985, Petitioner was convicted of first degree murder and sentenced to life imprisonment. The Oklahoma Court of Criminal Appeals affirmed the judgment and sentence in Battiest v. Cowley, 755 P.2d 688 (Okla. Crim. App. 1988). Petitioner then sought post-

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conviction relief in the District Court of Wagoner county, alleging the ineffective assistance of counsel. The district court denied relief and the Court of Criminal Appeals affirmed on March 7, 1989. Thereafter, Petitioner filed a petition for a writ of habeas corpus in the Eastern District of Oklahoma, Case No. 89-316-C, raising five grounds of ineffective assistance of counsel. Following a reversal of its order dismissing the case for failure to exhaust state remedies, the Eastern District addressed Petitioner's five claims of ineffective assistance of counsel and found that counsel was effective under the Sixth Amendment. That finding was affirmed by the Tenth Circuit Court of Appeals in an unpublished opinion.

In the instant petition, Petitioner again alleges ineffective assistance of counsel. This time, however, he bases his claim on grounds that counsel was "seriously deficient." He argues that counsel failed to adequately investigate and prepare for both trial and appeal.

II. ANALYSIS

The law regarding dismissal of successive section 2254 petitions is clear. Rule 9(b) states as follows:

> **Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In this case it is undisputed that Petitioner previously filed a habeas corpus action in the Eastern District and that the court

denied Petitioner's ineffectiveness claims on the merits. Therefore, the Petitioner bears the burden of showing that "'although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground.'" Parks v. Reynolds, 958 F.2d 989, 994 (10th Cir. 1992) (quoting Sanders v. United States, 373 U.S. 1 (1963)), cert. denied, 112 S.Ct. 1310 (1992). In McClesky v. Zant, 499 U.S. 467, 495 (1991), the Supreme Court equated the "ends of justice" inquiry with the "fundamental miscarriage of justice" inquiry. See also Parks, 958 F.2d at 994.

The Supreme Court recently summarized its prior holdings involving a defendant's subsequent use of the habeas writ. In Herrera v. Collins, 113 S.Ct. 853 (1993), the Court stated "that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." See also McClesky v. Zant, 499 U.S. 467, 495 (1991); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion); Parks v. Reynolds, 958 F.2d at 995.

The Petitioner has made no colorable showing of actual innocence which would justify reaching the merits of the successive claim raised in the present petition. Nor do Petitioner's claims that his counsel was seriously deficient suffice to meet that

standard. Therefore, the Court finds that Petitioner's ineffective assistance of counsel claim should be dismissed as a successive claim under Rule 9(b).

Even if the Court were to treat Petitioner's ineffective assistance claim as a new claim under Rule 9(b), it would still be subject to dismissal as an abusive claim. Petitioner has not shown adequate cause or prejudice under the strict McCleskey standard for failing to raise that claim in the first habeas petition. See McCleskey v. Zant, 499 U.S. 467 (1991). Nor has he met the narrow miscarriage of justice exception to the cause requirement, as he has not demonstrated that the alleged constitutional violation caused the conviction of an innocent man. Id. at 495.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss (doc. #4) is **granted and** the petition is **dismissed** as a successive petition under **Rule 9(b)** of the Rules Governing section 2254 cases.

SO ORDERED THIS 15 day of March, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRANK TAUCHER and MARKET MOVEMENTS, INC.	)	
Plaintiff,	)	
vs.	)	Case No. 94-C-457-K
ALEXANDER ELDER and FINANCIAL TRADING SEMINARS, INC.	)	
Defendants.	)	

ORDER

Now before the court is the motion for award of attorney fees by defendants, Alexander Elder and Financial Trading Seminars, Inc. Plaintiffs, Frank Taucher and Market Movements, Inc. initiated a libel action in Oklahoma District Court, Tulsa County on January 3, 1992 against the two present defendants and Oster Communications, Inc.. Defendants removed this case to federal court, where it was assigned case no. 92-C-98-B. By Order entered August 14, 1992, Judge Thomas R. Brett granted the defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). On August 21, 1992 plaintiffs filed a motion for leave to file an amended complaint. By Order of September 15, 1992, Judge Brett denied the motion for leave to file an amended complaint.

On April 11, 1994, plaintiff filed a state court action against the two present defendants alleging breach of contract through publication of a book review. Defendants removed the case to this court on May 4, 1994. By Order entered October 19, 1994

this court granted the defendants' motion for summary judgement based on the doctrine of res judicata and collateral estoppel, stating that denial of leave to amend constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading. On October 27, 1994, defendants, pursuant to Local Rule 54.2, filed a motion for award of attorney fees incurred in defending this action. On November 15, 1994, Plaintiffs, in response, filed an objection to defendants' motion for attorney fees. Defendants, on January 19, 1995, filed a request for hearing on motion for award of attorney fees.

The traditional "American Rule" is that the prevailing litigant is ordinarily not entitled to collect attorney fees from the loser in the absence of statutory authorization. Alyeska Pipeline Service Company v. Wilderness Society, 95 S. Ct. 1612, 1613, 421 U.S. 240, 241 (1975). Oklahoma, by statute, allows an award of attorney fees in limited situations. Specifically, it allows attorney fees to be awarded to the prevailing party "[i]n any civil action to recover on [a] contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services. . ." 12 O.S. §936. Plaintiffs have not disputed the action brought by them sought recovery on a contract relating to the purchase or sale of goods (i.e., alleging the existence of a contract between the parties in which defendants would use their best efforts to market plaintiffs' book). The Tenth Circuit has repeatedly held that in a diversity suit, state law controls the award for attorney fees. Rockwood Insurance Company v. Clark Equipment Co. Inc., 713 F.2d 577, 579 (10th Cir. 1983). Hefley v.

Jones, 687 F.2d 1383, 1389 (10th Cir. 1982).

The thrust of the defendants' argument is that since the plaintiffs' cause of action was premised upon a "contract relating to the purchase or sale of goods" and because the defendants were the prevailing parties in this action, they are entitled to an award of attorney fees pursuant to Title 12 O.S. §936.

The plaintiffs contend that, while Title 12 O.S. §936 does provide for an award of attorney fees in a breach of contract action relating to the sale of goods, the defendants do not meet the statutory definition of "prevailing party" in this action. The plaintiffs argue that the State of Oklahoma requires that the award of attorney fees is granted to a prevailing party if that party prevails "on the merits", which means prevailing on the real or substantial grounds of the action or defense as distinguished from matters of practice, procedure, or form. The plaintiffs contend that since this court granted the defendants' motion for summary judgment on res judicata grounds, the defendants did not prevail "on the merits" in this action but instead prevailed on a procedural issue and therefore should not be awarded attorney's fees.

An award of fees to a prevailing party under §936 is mandatory. Arkla Energy Resources v. Roye Realty and Development, Inc., 9 F.3d 855, 865 (10th Cir. 1993). However, a prevailing party under the statute must have prevailed upon the merits. Id. at 866. The Court is aware of no decision making the distinction for which plaintiffs argue in the context of denominating the "prevailing

party". Chester v. St. Louis Housing Authority, 873 F.2d 207 (8th Cir.1989), not cited by either party, involved a denial of attorney fees after a judgment on res judicata grounds under the quite different standard required in Title VII cases. The Chester court did not hold defendant was not the prevailing party. Further, in Anthony v. Marion County Gen. Hosp., 617 F.2d 1164 (5th Cir.1980), the plaintiff's complaint was dismissed with prejudice for failure to prosecute. The court stated: "Although there has not been an adjudication on the merits in the sense of a weighing of facts, there remains the fact that a dismissal with prejudice is deemed an adjudication on the merits for the purposes of res judicata. As such, the hospital has clearly prevailed in this litigation." Id. at 1169-70. See also Southford v. Hatton, 566 So.2d 527 (Fla. Dist. Ct. App.1990)(trustee who prevailed on his motion for summary judgment on the grounds of res judicata and collateral estoppel should have been awarded attorney fees).

Under Oklahoma law, "[t]he prevailing party is the party who has an affirmative judgment rendered in his favor at the conclusion of the entire case." The Company, Inc. v. Trion Energy, 761 P.2d 470, 471-72 (Okla.1988). By this definition, defendants are the prevailing parties in this action. The defendants have provided detailed time records and affidavits in support of their request for fees in the amount of $3,370.00. Plaintiffs have not challenged the reasonableness of the amount sought.

It is the Order of the Court that the motion of the defendants for award of attorney fees is hereby GRANTED in the

amount of $3,370.00. Defendants' request for hearing on motion for award of attorney fees is DENIED as moot.

ORDERED this 15 day of March, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM DAVID SIXKILLER,

Plaintiff,

v.

BARTLETT COLLINS CO., a division of INDIANA GLASS CORPORATION,

Defendant.

Case No. 94-C-1152K

DISMISSAL WITH PREJUDICE

Plaintiff, WILLIAM DAVID SIXKILLER, and Defendant, BARTLETT-COLLINS COMPANY, pursuant to Federal Rule of Civil Procedure 41, hereby stipulate and agree to the dismissal with prejudice of said cause, all issues therein presented having now been compromised, settled, satisfied, and released between the parties. The parties agree that the Court shall retain jurisdiction to resolve any future disputes which may arise in connection with the settlement agreement executed by the parties. Each party shall bear its own costs, expenses, and attorney fees.

John F. McCormick, Jr., OBA #5915
William D. Toney, OBA #9060
Kevin P. Doyle, OBA #13269
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(918) 227-2590

ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOMINO'S PIZZA, INC., a Michigan corporation,

Plaintiff,

vs.

EL-TAN, INC., an Oklahoma corporation; MICHAEL A. ELLIS, an individual; DANNY TAN SHEAU YANG, an individual; OWASSO PIZZA, INC., an Oklahoma corporation; and WAYNE SALISBURY, an individual,

Defendants.

Case No. 95-C-180-B

DOMINO'S PIZZA, INC. a Michigan corporation,

Plaintiff,

v.

ELVIEANNA LYNNE POTTS, an individual,

Defendant.

Case No. 95-C-182-BU

DOMINO'S PIZZA, INC. a Michigan corporation,

Plaintiff,

v.

B.A. ENTERPRISES, INC., an Oklahoma corporation; LEWIS WAYNE HUMBYRD, an individual; RONALD PREDL, an individual; and JERRY EVANS, an individual,

Defendants.

Case No. 95-C-181-B

INTERIM ORDER

This Court entered a Temporary Restraining Order on February 28, 1995, which was to remain in effect until this Court's hearing on the Preliminary Injunction which was scheduled for March 8, 1995 at 1:30 p.m. Due to an emergency situation involving John Gerkin, counsel for the Defendants, the Preliminary Injunction Hearing was reset, upon Defendants' application, until Wednesday, March 30, 1995 until 1:30 p.m.

Upon agreement of the parties, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants, their agents, servants, employees and all the persons acting by or under their authority or in concert with them are enjoined:

From using all classified and other directory listings relating to the tradenames, service marks and commercial symbols of the Plaintiff Domino's Pizza, Inc. ("Domino's") (the "Domino's Marks");

From using the following telephone numbers [(918) 251-3030; (918) 342-2050; (918) 241-3030; and (918) 274-0303] and any other numbers published or advertised with the Domino's Marks (the "Domino's Numbers") and from refusing to assign the Domino's Numbers to Domino's;

From displaying, either directly or indirectly, any Domino's Marks or any mark, tradedress, symbol, word or name similar to the Domino's Marks which is likely to cause confusion or mistake or deception, on signs, letters, literature, advertisements or other printed material, in a manner, style or form which imitates or is confusingly similar to Domino's use of the Domino's Marks or

otherwise tends to represent that Defendants are authorized, associated, affiliated, sponsored or approved by Domino's;

From refusing to take such action as may be required to cancel all assumed name or equivalent registrations relating to the use of any of the Domino's Marks;

From refusing to make such reasonable modifications to the exterior and interior decor of the former Domino's Pizza Stores to eliminate its identification as a Domino's Pizza Store.

From refusing to return all copies of the Domino's Operating Manual and all other proprietary information (provided however, Defendants shall be Ordered to deliver all copies of the door sheets and customer lists ("Customer Information") to Domino's to hold in its possession until a determination is made by this Court of the ultimate disposition of the Customer Information).

Upon agreement of the parties, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants are Ordered not to use such Customer Information for any purpose until further Order of this Court;

Upon agreement of the parties, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants, their agents, servants, employees and all persons acting by or under their authority or in concert with them are also specifically required to deliver all labels, signs, advertisements, catalogs, brochures, and other printed material in the possession of Defendants bearing the Domino's Marks.

The Court Orders that any additional finding of facts, conclusions of law or briefs may be filed with this Court no later than Monday, March 27, 1995.

This Interim Order shall remain in full force and effect until the hearing on Plaintiff's Motion for Preliminary Injunction to be held on March 30, 1995 at 1:30 p.m.

ENTERED this 13 day of March, 1995.

UNITED STATES DISTRICT JUDGE
for Thomas R. Brett, Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 16 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CLARE DAVIDSON SCHACHTER, as Personal Representative of the Estate of BARBARA JEAN DAVIDSON, Deceased, and CLARE DAVIDSON SCHACHTER, Individually, for and on behalf of Clare Davidson Schachter, Jack Davidson, and Jill Davidson Rooney, as surviving children of BARBARA JEAN DAVIDSON, Deceased,

Plaintiff,

vs.

PACIFICARE OF OKLAHOMA, INC., an Oklahoma corporation, and RAYBURNE W. GOEN, M.D., Individually, and THE WHEELING MEDICAL GROUP, an Oklahoma Corporation, (now known as WHEELING/OMNI, INC.),

Defendants.

Case No. 94-C-203-BU

ENTERED ON DOCKET

DATE MAR 15 1995

ORDER

The plaintiff, Clare Davidson Schachter ("Schachter"), originally commenced this action in the District Court in and for Tulsa County, Oklahoma, individually and on behalf of Jack Davidson and Jill Davidson Rooney, surviving children of Barbara Jean Davidson, and as personal representative of the estate of Barbara Jean Davidson. The defendant, PacifiCare of Oklahoma, Inc. ("PacifiCare"), is a health maintenance organization, which furnished employee health care benefits for the employer of Schachter's deceased mother, Barbara Jean Davidson. The defendant, Rayburne W. Goen, M.D. ("Dr. Goen"), was at all times relevant to this action, the physician who provided medical care to Barbara Jean Davidson ("Davidson"). The defendant, The Wheeling Medical

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called & c/m counsel

Group ("Wheeling"), was at all times relevant to this action, the employer of Dr. Goen.

In her third amended complaint, Schachter alleges that Davidson was admitted as a patient to St. John Medical Center in Tulsa, Oklahoma, with an acute abdomen and a huge hematoma in her lower right abdominal wall. She also alleges that Davidson was suffering from enlargement of the liver, painful abdomen with rebound and abnormally and severely small amounts of prothrombin in the circulating blood. According to Schachter, Dr. Goen told Davidson that she had pernicious anemia and that her prothrombin time was dangerously excessive and that she had massive bleeding-caused abdominal hematoma. Schachter alleges that even though Davidson was actively bleeding, she was dismissed from the hospital. Schachter further alleges that during the night following her dismissal, Davidson bled to death. Based upon these factual allegations, Schachter alleges that PacifiCare is liable (i) vicariously for the medical malpractice of its alleged ostensible agent, Dr. Goen, (ii) for fraud for allegedly inducing Davidson to rely upon PacifiCare for her health care, and (iii) for loss of consortium for the alleged wrongful death of Davidson.

PacifiCare timely removed this action to this Court pursuant to 28 U.S.C. § 1441 and § 1446 on the ground that Schachter's state law claims against PacifiCare are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. PacifiCare now moves for summary judgment on Schachter's claims pursuant to Rule 56, Fed. R. Civ. P. PacifiCare

specifically argues that summary judgment is appropriate because Schachter's state law claims are preempted by ERISA and ERISA does not authorize recovery of damages for PacifiCare's alleged misconduct. It further argues that even if Schachter's claims are not preempted, summary judgment is appropriate as the undisputed facts show that Dr. Goen was not the ostensible agent of PacifiCare as alleged by Schachter.

Section 514(a) of ERISA provides that its provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The ERISA preemption provision applies to state common and statutory law actions which "relate to" employee benefit plans. Pilot Life Ins. Co. v. Dedeaux, 107 S.Ct. 1549, 1553 (1987). The Supreme Court has stated that a state law "relates to" an employee benefit plan "in the normal sense, if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 103 S.Ct. 2890, 2900 (1983). A state law may "relate to" a benefit plan "even if the law is not specifically designed to affect such plans, or the effect is only indirect." District of Columbia v. Greater Washington Bd. of Trade, 113 S.Ct. 580, 583 (1992)(quoting Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478, 483 (1990)). Although the words "relate to" are to be construed expansively, Fort Halifax Packing Co. v. Coyne, 107 S.Ct. 2211, 2215 (1987), the scope of the ERISA preemption is not unlimited, Ingersoll-Rand Co., 111 S.Ct. at 483. State law will not be preempted when it has only "a 'tenuous, remote, or peripheral' connection with covered plans,

as is the case with many laws of general applicability." Greater Washington Bd. of Trade, 113 S.Ct. at 583 n. 1 (quoting Shaw v. Delta Airlines, Inc., 103 S.Ct. at 2901 n. 21 (1983)). Similarly, "lawsuits against ERISA plans for run-of-the-mill claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan," are not preempted by Section 514(a). Mackey v. Lanier Collection Agency and Serv., Inc., 486 U.S. 825, 833 (1988).

No circuit courts have addressed ERISA's preemptive effect on a state law tort claim against a health maintenance organization based upon the theory of vicarious liability and/or theory of ostensible agency. The district courts which have addressed the issue are divided. Several courts have held that ERISA preempts a state law claim against a health maintenance organization for the negligence of one of its participating physicians. See, Visconti by Visconti v. U.S. Health Care, 857 F.Supp. 1097 (E.D. Pa. 1994); Dukes v. U.S. Health Care Systems of Pennsylvania, Inc., 848 F.Supp. 39 (E.D. Pa. 1994); Nealy v. U.S. Healthcare HMO, 844 F.Supp. 966 (S.D.N.Y. 1994); Ricci v. Gooberman, 840 F.Supp. 316 (D.N.J. 1993); Altieri v. Cigna Dental Health, Inc., 753 F.Supp. 61 (D. Conn. 1990). These courts have reasoned that a vicarious liability and/or ostensible agency claim "relates to" the benefit plan because it requires an examination of how the plan benefits are described to the beneficiary and how the relationship of the health maintenance organization to the care-provider is described. In addition, they have reasoned that the claim "relates to" the benefit plan because it is based on the circumstances of medical

treatment provided pursuant to the benefit plan.

Other courts, however, have held that ERISA does not preempt a state law negligence claim against a health maintenance organization sued on the theory of vicarious liability and/or theory of ostensible agency. See, Dearmas v. Av-Med, Inc., 865 F.Supp. 816 (S.D. Fla. 1994); Paterno v. Alburerne, 855 F.Supp. 1263 (S.D. Fla. 1994); Burke v. Smithkline Bio-Science Laboratories, 858 F.Supp. 1181 (M.D. Fla. 1994); Kearney v. U.S. Healthcare, Inc., 859 F.Supp. 182 (E.D. Pa. 1994); Smith v. HMO Great Lakes, 852 F.Supp. 669 (N.D. Ill. 1994); Independence HMO v. Smith, 733 F.Supp. 983 (E.D. Pa. 1990); Elsesser v. Hosp. of Phil. Col. of Osteopathic Med., 802 F.Supp. 1286 (E.D. Pa. 1992). In reaching their decisions, these courts have concluded that a vicarious liability and/or ostensible agency claim against a health maintenance organization is not sufficiently "related to" ERISA so as to warrant preemption. Id.

Having reviewed the cases addressing the issue, the Court concurs with the reasoning of the courts which have held that ERISA does not preempt a state law tort claim brought against a health maintenance organization premised upon vicarious liability and/or ostensible agency. The Court specifically finds the court's analysis in Kearney persuasive. In the Court's view, the court in Kearney correctly opined that the question of a doctor's negligence does not require reference to a benefit plan in order to determine whether the service provided was that which was promised. As articulated by the Kearney court:

> "A determination that a treating physician committed malpractice does not require examination of the plan to decide whether the service provided was that which was promised. What is required is evidence of what transpired between the patient and physician and an assessment of whether in providing admittedly covered treatment or giving professional advice the physician possessed and utilized the knowledge, skill and care usually had and exercised by physicians in his community or medical specialty. As noted, a claim that one was denied a promised benefit is preempted. A claim that one received promised service from a provider who performed that service negligently is another matter."

Kearney, 859 F.Supp. at 186.

The Court also opines that the Kearney court properly reasoned that any reference to the plan to determine the issue of agency does not implicate the concerns of the ERISA preemption provision. Id. A medical malpractice action, such as that at issue in the instant case, does not involve a claim for benefits, a claim to enforce rights under the benefit plan or a claim challenging administration of the benefit plan. It simply involves a claim that the deceased received allegedly negligent treatment from a doctor who was "held out" by the health maintenance organization as its agent. The action only requires a determination that the services provided deviated from the applicable standard of care. In the Court's view, such action affects the benefit plan, if at all, "in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw, 463 U.S. at 100 n. 21.

PacifiCare has argued that the cases finding no ERISA preemption are not well reasoned because they differentiate between direct and indirect negligence claims against a health maintenance

organization. The Court disagrees. The cases involving direct negligence claims against the health maintenance organization arose because of the way the health maintenance organization administered plan benefits. Kuhl v. Lincoln Nat'l Health Plan, 999 F.2d 298, 303 (8th Cir. 1993), cert. denied, 114 S.Ct. 694 (1994) (malpractice claim against health maintenance organization for delaying heart surgery stemming from administration of benefits); Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1332-34 (5th Cir.), cert. denied, 113 S.Ct. 812 (1992) (malpractice claim against health maintenance organization based upon utilization review decision that hospitalization was not medically necessary); Elsesser, supra. (malpractice claim for failure to provide funding for medical device). In this case, Plaintiff's claim does not arise from PacifiCare's administration of benefits, or the type of benefits provided by PacifiCare. Rather, it is based on alleged substandard treatment provided by a treating physician. Therefore, the Court finds that the differentiation between direct and indirect negligence claims is compelling.

In addition to the medical malpractice claim based upon the theory of vicarious liability and/or the theory of ostensible agency, Schachter has alleged a fraud claim. The Court agrees with PacifiCare that the fraud claim alleged by Schachter, "relates to" the employee benefit plan and is preempted by Section 514(a) of ERISA. Kearney, 859 F. Supp. at 184-185; Elsesser, 802 F.Supp. at 1292; Nealy, 844 F.Supp. at 972; Altieri, 753 F.Supp. at 64. The Court, therefore, concludes that PacifiCare is entitled to summary

judgment in regard to that claim.[1]

The last claim for which Schachter seeks recovery of damages is loss of consortium. The Court finds that preemption does not apply to this particular claim because the health care plan is not implicated. Schachter can recover for loss of consortium without reference to the plan or the actions by PacifiCare pursuant to the plan. Therefore, the loss of consortium claim does not relate to the employee benefit plan and is not preempted by ERISA. See, Dearmas, supra.

This action was removed to this Court on the basis of the complete preemption doctrine under ERISA. See, Metropolitan Life Insurance Co. v. Taylor, 107 S.Ct. 1542 (1987). The Court has found that Schachter's fraud claim is preempted and has granted summary judgment in regard to that claim. Since the remainder of this action involves pendent state law claims, the Court, in its discretion, declines to exercise its supplemental jurisdiction over those claims. 28 U.S.C. § 1367(c)(3). These claims shall be remanded to the District Court in and for Tulsa County, Oklahoma for adjudication.

Based upon the foregoing, the defendant, PacifiCare of Oklahoma, Inc.'s Motion for Summary Judgment (Docket No. 58) is GRANTED to the extent it seeks judgment that Schachter's fraud claim is preempted under ERISA and is DENIED to the extent it seeks

[1]Since Schachter has failed to allege any facts giving rise to a fraud claim under ERISA, this Court presumes that no such claim exists and therefore finds that summary judgment on the pending fraud claim is appropriate.

judgment that Schachter's medical malpractice claim based upon the theory of vicarious liability and/or the theory of ostensible agency and loss of consortium claim are preempted. The Court REMANDS the remainder of this action to the District Court in and for Tulsa County, Oklahoma. In light of the Court's decision to remand this action, the Court declares MOOT the defendant PacifiCare of Oklahoma, Inc.'s Motion for Summary Judgment (Docket No. 58) to the extent that it seeks judgment on the merits of Schachter's medical malpractice based upon the theory of vicarious liability and/or the theory of ostensible agency. The Court also declares MOOT the defendants, Rayburne W. Goen, M.D. and The Wheeling Medical Group's Motion in Limine (Docket No. 60).

ENTERED this 16th day of March, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 14 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CLARENCE E. LONON,

Plaintiff,

vs.

TRACY PROPERTIES INC., et al.,

Defendants.

Case No. 94-C-125-BU

ENTERED ON DOCKET

DATE MAR 15 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 13th day of March, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

30

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

BRENDA CATOZZI,

Plaintiff,

v.

ZEP MANUFACTURING COMPANY, an unincorporated operating division of NATIONAL SERVICES INDUSTRIES, INC.,

Defendant.

Case No. 94-C-77-K

ORDER

Plaintiff Brenda Catozzi and Defendant ZEP Manufacturing Company herein having consented to a Voluntary Stipulation of Dismissal of the above-captioned matter against Defendant with prejudice, the Court APPROVES the Stipulation of Dismissal. Pursuant to Federal Rule of Civil Procedure 41(a), the above captioned action is ORDERED dismissed with prejudice, each party to bear her and its own respective costs.

This 13 day of March, 1995.

Terry C. Kern
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOAN VIRDEN,

Plaintiff,

v.

JANE PHILLIPS EPISCOPAL HOSPITAL, an Oklahoma Non-Profit Corporation,

Case No. 94 C 563 E

ORDER

UPON the joint stipulation of the Plaintiff, Joan Virden and the Defendant, Jane Phillips Episcopal Hospital, an Oklahoma Non-Profit Corporation, for the dismissal of the above-captioned case with prejudice, and good cause having been shown,

IT IS ORDERED, ADJUDGED AND DECREED that the instant action is dismissed with prejudice, each side to bear her or its own costs, expenses and attorneys' fees.

Terry C. Kern
UNITED STATES DISTRICT JUDGE

RB

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL A. SCOTT; PATRICIA J. SCOTT; FIDELITY FINANCIAL SERVICES aka FIDELITY FINANCIAL SERVICE, INC.; TRIAD BANK, N.A.; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 94-C 650B

FILED
MAR 15 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 30, 1995, pursuant to an Order of Sale dated November 1, 1994, of the following described property located in Tulsa County, Oklahoma:

> Lot Eight (8), Block Six (6), WOLF CREEK ESTATES, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Michael A. Scott; Patricia J. Scott; Fidelity Financial Services aka Fidelity Financial Services, Inc. through its Attorney Roger A. Long; Triad Bank, N.A. through its Attorney Matthew Nowinski; City of Broken Arrow, Oklahoma through the City

Attorney Michael R. Vanderburg; and to County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be

granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C 650B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED L. WATSON aka FRED WATSON; KAREN A. WATSON aka KAREN WATSON; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; FOUNDERS OF DOCTORS' HOSPITAL, INC., successor by name change to DOCTORS' MEDICAL CENTER, INC.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

MAR 15 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 94-C 604B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 19, 1995, pursuant to an Order of Sale dated October 17, 1994, of the following described property located in Tulsa County, Oklahoma:

> Lot Twenty-One (21), Block Two (2), VONNIE JO ACRES ADDITION, in Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Fred L. Watson aka Fred Watson; Karen A. Watson aka Karen Watson; State of Oklahoma ex rel Oklahoma Tax Commission through Assistant General Counsel Kim D. Ashley;

NOTE: THIS [illegible]
BY [illegible]
PRO [illegible]
UPON [illegible]

Founders of Doctors' Hospital Inc., successor by name change to Doctors' Medical Center, Inc. through their Attorney Daniel M. Webb; and to County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley; and to the purchasers, Maxine Kennedy, David Rule, and Mary Kennedy, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Maxine Kennedy, David Rule and Mary Kennedy, they being the highest bidders. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, Maxine Kennedy, David Rule, and Mary Kennedy, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

for LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C 604B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JERRY A. LITTLEJOHN aka JERRY ALAN LITTLEJOHN; JANICE M. LITTLEJOHN aka JANICE MARIE LITTLEJOHN; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED
MAR 15 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 94-C 593B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 18, 1995, pursuant to an Order of Sale dated October 25, 1994, of the following described property located in Tulsa County, Oklahoma:

> Lot Five (5), Block Nine (9), SUBURBAN ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Jerry A. Littlejohn; Janice M. Littlejohn; State of Oklahoma ex rel Oklahoma Tax Commission through Assistant General Counsel Kim D. Ashley; and County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley, by

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

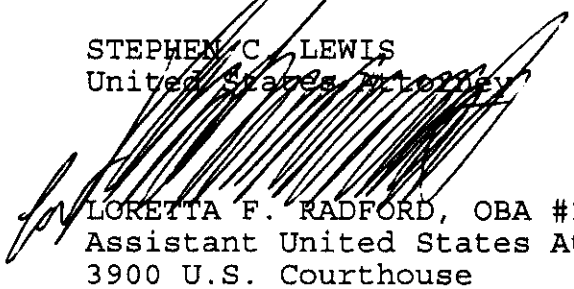
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C 593B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES L. POTTER aka JAMES LEONARD POTTER; KIM EILEEN POTTER; CHARLES W. POTTER; THE RIVERHOUSE BOARD OF ADMINISTRATORS aka RIVERHOUSE CONDOMINIUM ASSOCIATION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

MAR 15 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 94-C 461B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 18, 1995, pursuant to an Order of Sale dated October 25, 1994, of the following described property located in Tulsa County, Oklahoma:

> UNIT "A", THE RIVERHOUSE, a Condominium created under a Declaration of Unit Ownership Estates, filed in Book 4422 at Pages 980 thru 1037, inclusive and located on the following described property:
>
> The East 80 feet of Lot Ten (10) in AARONSON'S RESUBDIVISION OF BLOCK SEVEN (7), BUENA VISTA PARK ADDITION, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given

NOTE: THIS ORDER IS NOT TO BE ... BY ... PRO ... UPON RECEIPT.

the Defendants, James L. Potter aka James Leonard Potter; Kim Eileen Potter; Charles W. Potter; The Riverhouse Board of Administrators aka Riverhouse Condominium Association through its Representative Laurie Fiocchi; to the County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley; and to the purchasers, Gordon Scott Cole, Ross Gregory Conatser and Robert Ellis Baker, D.O., by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Gordon Scott Cole, Ross Gregory Conatser, and Robert Ellis Baker, D.O., they being the highest bidders. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, Gordon

Scott Cole, Ross Gregory Conatser, and Robert Ellis Baker, D.O., a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

Phil Pinnell

for LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VERDINER WILSON; JAMES WILSON aka JAMES M. WILSON; JAMES WILSON, JR. aka JIMMY D. WILSON aka J.D. WILSON, JR.; STATE OF OKLAHOMA, ex rel., OKLAHOMA TAX COMMISSION; HILLCREST MEDICAL CENTER; STATE OF OKLAHOMA, ex rel., DEPARTMENT OF HUMAN SERVICES; PEGGY L. PETERSON; MARK'S AUTO-INDUSTRIAL WAREHOUSE; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C 341B

FILED

MAR 15 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 30, 1995, pursuant to an Order of Sale dated November 10, 1994, of the following described property located in Tulsa County, Oklahoma:

> Lot One (1), in Block Five (5), SMITHDALE, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, State of Oklahoma ex rel Oklahoma Tax Commission

NOTE: THIS ORDER IS NOT TO BE FILED BY MOVANT'S COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

through Assistant General Counsel Kim D. Ashley; Hillcrest Medical Center through its Attorney Daniel M. Webb; State of Oklahoma ex rel Department of Human Services through its Attorney Rodney Sparkman; Mark's Auto-Industrial Warehouse; and to County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley, by mail; and to Defendants, Verdiner Wilson, James Wilson aka James M. Wilson and James Wilson, Jr. aka Jimmy D. Wilson aka J.D. Wilson, Jr., by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the

Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

for LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 9 4-C 341B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TINA J. PRUITT; JOE PRUITT; aka KENNETH JOE PRUITT aka KENNETH J. PRUITT; TULSA GREAT EMPIRE BROADCASTING, INC. dba KVOO RADIO; CITY OF BIXBY; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

NOTE: THIS ORDER WAS MAILED [illegible] COUNSEL AND PARTIES OF RECORD IMMEDIATELY UPON RECEIPT.

CIVIL ACTION NO. 94-C 235B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 30, 1995, pursuant to a Second Order of Sale dated November 8, 1994, of the following described property located in Tulsa County, Oklahoma:

> BEING LOT FIFTY-FOUR (54), BLOCK TWO (2), BLUE RIDGE II, AN ADDITION TO THE CITY OF BIXBY, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Tina J. Pruitt, Tulsa Great Empire Broadcasting, Inc. dba KVOO Radio, through its attorney John R. Pinkerton, City of Bixby, Oklahoma, and County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through

Assistant District Attorney Dick A. Blakeley, by mail, and to Joe Pruitt by Publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

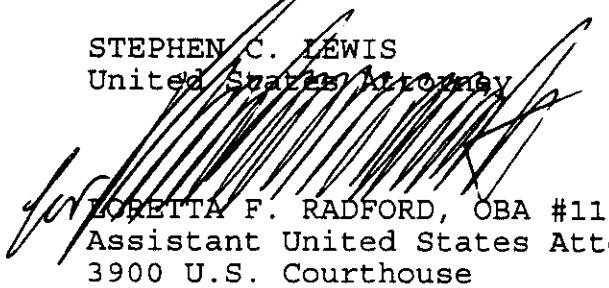
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S, MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C 235B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
DEWEY R. TALLANT a/k/a)
DEWEY RICHARD TALLANT, et al.)
)
Defendants.) CIVIL ACTION NO. 94-C-94-B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15 day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 23, 1995, pursuant to an Order of Sale dated September 15, 1994, of the following described property located in Rogers County, Oklahoma:

> The N 1/2 of Lot 1 in Block 2 of SUNNY ACRES II, a Subdivision in Section 11, Township 21 North, Range 17 East of the IB&M, Rogers County, Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendant, Dewey R. Tallant aka Dewey Richard Tallant, by publication; and notice as given the Defendants, Kerry N. Robertson, Judy A. Robertson, State of Oklahoma ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant General Counsel, and County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, through Glenna S. Dorris, Assistant District

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Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Claremore Daily Progress, a newspaper published and of general circulation in Rogers County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

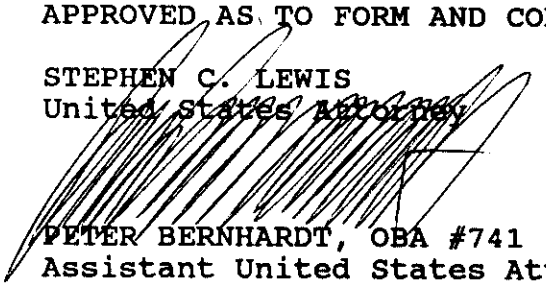
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PB/esf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ERNEST E. KUEHN, JR.; VIOLA M. KUEHN; COUNTY TREASURER, Nowata County, Oklahoma; and **BOARD OF COUNTY COMMISSIONERS,** Nowata County, Oklahoma,	)	
	)	
Defendants.	)	CIVIL ACTION NO. **92-C-830-B**

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 25, 1995, pursuant to an Order of Sale dated August 10, 1994, of the following described property located in Nowata County, Oklahoma:

The South 1/2 of the SE/4 SW/4, Section 6, Township 28 North, Range 16 East.

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendants, **Ernest E. Kuehn, Jr. and Viola M. Kuehn,** by mail and through their attorney **W. E. Maddux,** by mail; **County Treasurer, Nowata County, Oklahoma,** by mail; and **Board of County Commissioners, Nowata County, Oklahoma,** by mail; and the Purchasers, **Vernon H. Kuehn and Gloria D. Kuehn,** by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Nowata Star, a newspaper published and of general circulation in Nowata County, Oklahoma, and that on the day fixed in the notice the property was sold to **Vernon H. Kuehn and Gloria D. Kuehn, Route 1, Box 339, South Coffeyville, Oklahoma 74072**, they being the highest bidders. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, **Vernon H. Kuehn and Gloria D. Kuehn, Route 1, Box 339, South Coffeyville, Oklahoma 74072**, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchasers be granted possession of the property against any or all persons now in possession.

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Civil Action No. 92-C-830-B

PB:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,

vs.

DORTHY W. STITH aka DOROTHY W. STITH; CITY OF TULSA, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.

CIVIL ACTION NO. 94-C 463E

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on December 19, 1994, pursuant to an Order of Sale dated October 13, 1994, of the following described property located in Tulsa County, Oklahoma:

> Lot Twenty (20), Block Eleven (11), SUBURBAN ACRES SECOND ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, City of Tulsa, Oklahoma through Assistant City Attorney Russell R. Linker II, and County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley, by mail, and to Defendant, Dorthy W. Stith aka Dorothy W. Stith by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

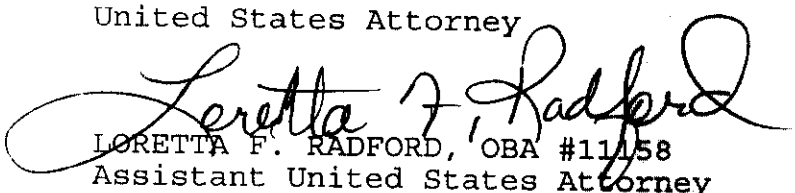
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
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LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C 463E

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED P. LEIDING, JR. aka FREDERICK PAUL LEIDING JR.; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C 520E

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 19, 1995, pursuant to an Order of Sale dated October 19, 1994, of the following described property located in Tulsa County, Oklahoma:

> Lot Seven (7), Block Two (2), LEISURE PARK II, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Fred P. Leiding, Jr.; City of Broken Arrow, Oklahoma through the City Attorney Michael R. Vanderburg; and County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley, by mail, and they do not appear. Upon

hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

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United States Attorney

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Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C 520E

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIFFORD L. THOMAS; SADIE PRISCILLA THOMAS; COUNTY TREASURER, Osage County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma,

Defendants.

CIVIL ACTION NO. 93-C-253-BU

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15 day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 26, 1995, pursuant to a Second Order of Sale dated December 1, 1994, of the following described property located in Osage County, Oklahoma:

> The South 5 feet of Lot 8, and all of Lot 7, in Block 2, Monarch Heights, an Addition to Tulsa, Osage County, Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendants, Clifford L. Thomas, Sadie Priscilla Thomas, and County Treasurer and Board of County Commissioners, Osage County, Oklahoma, through John S. Boggs, Jr., Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

NOTE: [illegible] BY [illegible] COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Second Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Pawhuska Journal-Capital, a newspaper published and of general circulation in Osage County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Second Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

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United States Attorney

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PB/esf

Report and Recommendation of United States Magistrate Judge
Civil Action No. 93-C-253-BU

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF ARTHUR FIELDS aka ARTHUR R. FIELDS, SR., Deceased, et al., Defendants.	)	CIVIL ACTION NO. 93-C-487-K

FILED

MAR 15 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 15th day of March, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 24, 1995, pursuant to an Order of Sale dated September 6, 1994, of the following described property located in Pawnee County, Oklahoma:

> **Lot Two (2) in Block One (1) in HILLCREST ADDITION to the City of Pawnee, Pawnee County, State of Oklahoma, according to the recorded plat thereof.**
> **SUBJECT, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations and mineral conveyances of record.**

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields aka Arthur R. Fields, Sr., Deceased; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of

NOTE: THIS ORDER IS TO BE MAILED BY [illegible] TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

Eva Lois Fields Nordwall, Deceased; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Arthur Fields, Jr., Deceased; Gwen Lois Nordwall Tinker; Richard Ralph Nordwall; Ahnawake Rose Nordwall Yandell; Michael Scott Fields; Richard D. Fields; Raymond C. Fields; Harrison O. Fields, by publication; James E. Fields aka James Edward Fields, individually; James E. Fields aka James Edward Fields, Administrator of the Estate of Ahnawake M. Fields aka Ahnawake Martha Fields, Deceased; James E. Fields aka James Edward Fields, Administrator With Will Annexed of the Estate of Arthur Fields aka Arthur R. Fields, Sr., Deceased; Raymond Curtis Nordwall; Lisa Fields; Lyle Fields; Michael Scott Fields; Ramona Delores Fields aka Ramona Castleberry; Charles Buchanan Fields; County Treasurer, Pawnee County, Oklahoma; Board of County Commissioners, Pawnee County, Oklahoma; State of Oklahoma ex rel. Oklahoma Tax Commission, through its attorney Kim D. Ashley; and Arthur Fields, III, by mail; and Purchaser, Max J. Heisler, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Pawnee Chief, a newspaper published and of general circulation in Pawnee County, Oklahoma, and that on the day fixed in the notice the property was sold to Max J. Heisler, Route 1, Box 274, Pawnee, Oklahoma 74058, he being the

highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, **Max J. Heisler, Route 1, Box 274, Pawnee, Oklahoma 74058**, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

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United States Attorney

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Report and Recommendation of United States Magistrate Judge
Civil Action No. 93-C-487-K

PB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPLIED ENERGY SYSTEMS, INC.,

Plaintiff,

vs.

WILLIAM R. RILEY,

Defendant.

Case No. 93-C-627-K

ORDER

On October 18, 1994, this Court entered Judgment in favor of the Plaintiff Applied Energy Systems ("Plaintiff") and against Defendant William R. Riley in the amount of $270,018.44, plus pre- and post-judgment interest thereon. Now before the Court is the Motion by Plaintiff for attorney fees as costs pursuant to 12 O.S. § 936.

Plaintiff moves the Court for attorney fees in the amount of $43,061.00 While 12 O.S. § 936 does provide that prevailing parties should receive attorney fees, the amount awarded must be reasonable. The trial court may consider a variety of factors in making this reasonableness determination. Arkoma Gas Co. v. Otis Engineering Corp., 849 P.2d 392, 394 (Okla. 1993). Along with the hourly rate charged by the attorney, the Court has considered the following factors:

1. The time and labor required by the nature of the action and expended by attorneys for Plaintiff;

2. The novelty and difficulty of the various legal theories asserted and the complexity of the issues involved;

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3. The level and degree of skill required to adequately defend the case;

4. The preclusion of other employment by the attorney due to acceptance of the case

5. Whether the fee charged by counsel for Applied is customary in the local legal community for attorneys of their experience and specialization;

6. Whether the fee is fixed or contingent;

7. Time limitations imposed by the client or the circumstances.

8. The amount sought as damages and the results obtained;

9. The experience, reputation, and ability of the attorney;

10. The "undesirability" of the case. [i.e. risk of non-recovery];

11. The nature and length of the professional relationship between Plaintiff and its counsel; and

12. Awards in similar cases.

See Oliver's Sports Center , Inc. v. National Standards Ins. Co., 615 P.2d 291, 294 (Okla. 1980); State ex rel. Burk v. City of Oklahoma City, 598 P.2d 659, 661 (Okla. 1979).

The Court has considered the factors listed above and holds that the amount requested by Plaintiff is excessive. This Court notes that the trial itself lasted only a few hours, involved a limited range of factual questions and only one legal issue. Defendant also points out that only one and one-half days were used to take depositions in the case. It is also evident that several associate attorneys were involved in case preparation, and many of the hours attributed to them appear to be redundant or unnecessary.

The Court has reviewed the documentation submitted by the Plaintiff and believes that $28,143 should be awarded as attorney

fees in the instant action. This figure employs the rates proposed by the Plaintiff but discounts a specific number of hours deemed to be unnecessary subject to careful review of the documents and the above-listed factors.

Accordingly, the Court awards to the Plaintiff attorneys fees in the sum of $28,143.

IT IS SO ORDERED THIS 13 DAY OF MARCH, 1995.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JONATHAN W. NEAL,

Plaintiff,

vs.

BAILIFF BAGBY, and JUDGE CLIFFORD HOPPER,

Defendants.

No. 95-C-0078-K

ORDER

Plaintiff, an inmate at the Tulsa County Jail, has again filed with the Court a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. In reliance upon the representations set forth in the motion, the Court concludes that Plaintiff should be granted leave to proceed in forma pauperis. The Court concludes, however, that Plaintiff's claims should be dismissed as frivolous under 28 U.S.C. § 1915(d).

In this civil rights action, Plaintiff sues Bailiff Bagby and District Judge Clifford E. Hopper, for failing to transport him from a holding cell in the Tulsa County Jail to Judge Hopper's courtroom for a court appearance. Plaintiff alleges that on January 9, 1995, he was removed from his cell in the Tulsa County Jail about 7:30 a.m. and placed in a holding cell on the ninth floor. Because Bailiff Bagby never came to transport him to Judge Hopper's courtroom, Plaintiff alleges that about 2:00 p.m. he was returned to his cell. Plaintiff seeks $50,000 in damages and an order releasing him from jail. (Doc. #1.)

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's claims against Bailiff Bagby and Judge Hopper do not amount to a constitutional violation. West v. Atkins, 487 U.S. 42, 48 (1988) (only the violation of a right secured by the Constitution or laws of the United States is actionable under 42 U.S.C. § 1983). Moreover, Judge Hopper is absolutely immune from this suit because he acted in his judicial capacity. See Stump v. Sparkman, 435 U.S. 349, 356 (1978); Schepp v. Fremont County, 900 F.2d 1448, 1451 (10th Cir. 1990). Accordingly, Plaintiff's complaint must be dismissed as frivolous under 28 U.S.C. § 1915(d).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is **granted; and**

(2) Plaintiff's civil rights complaint is **dismissed** as frivolous under 28 U.S.C. § 1915(d).

IT IS SO ORDERED this 13 day of March, 1995.

Terry C Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUN COMPANY, INC., (R & M), a Delaware corporation, and TEXACO INC., a Delaware corporation,

Plaintiffs,

vs.

BROWNING-FERRIS, INC., a Delaware corporation, et al.,

Defendants.

Case No. 94-C-820-B

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Plaintiffs, Sun Company, Inc. (R & M) and Texaco, Inc. hereby dismiss Defendant, TULSA RIG & IRON, ONLY without prejudice.

Dated this 27th day of February, 1995.

RHODES, HIERONYMUS, JONES
TUCKER & GABLE

By _____

JOHN H. TUCKER, OBA #9110
BENTON T. WHEATLEY, OBA # 14836
PO Box 21100
Tulsa, Oklahoma 74121-1100
(918) 582-1173

ATTORNEYS FOR PLAINTIFFS,
SUN COMPANY, INC. (R & M) and
TEXACO INC.

CERTIFICATE OF MAILING

I hereby certify that on this 10th day of March, 1995, I mailed a true and correct copy of the foregoing with proper postage thereon fully prepaid to all parties listed on the attached pages.

Peter T. Wilby

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Defendant, Charles Forhan d/b/a D & W Exterminating

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FREDERICK WASHINGTON)
)
Plaintiff,) NO. 94-C-115-B
)
v.)
)
NATIONAL INVITATIONAL CAMP, INC.,)
BLASTO, INC., NATIONAL FOOTBALL)
SCOUTING, INC., NATIONAL FOOTBALL)
LEAGUE COMBINEDS, NATIONAL)
FOOTBALL LEAGUE, INDIANAPOLIS)
COLTS, DALLAS COWBOYS, CLEVELAND)
BROWNS, DR. DONALD SCHELBOURNE,)
METHODIST SPORTS MEDICINE CENTER,)
NATIONAL ACCIDENT INSURANCE)
UNDERWRITERS, INC., HERITAGE)
LIFE INSURANCE COMPANY, GREEN)
BAY PACKERS, BUFFALO BILLS,)
CINCINNATI BENGALS, DENVER)
BRONCOS, HOUSTON OILERS, KANSAS)
CITY CHIEFS, LOS ANGELES RAIDERS,)
MIAMI DOLPHINS, NEW ENGLAND)
PATRIOTS, NEW YORK JETS,)
PITTSBURGH STEELERS, SAN DIEGO)
CHARGERS, SEATTLE SEAHAWKS,)
ATLANTA FALCONS, CHICAGO BEARS,)
DETROIT LIONS, LOS ANGELES RAMS,)
MINNESOTA VIKINGS, NEW YORK)
GIANTS, PHILADELPHIA EAGLES,)
PHOENIX CARDINALS, SAN FRANCISCO)
49ERS, TAMPA BAY BUCCANEERS,)
and WASHINGTON REDSKINS)
)
Defendants.)

ORDER

NOW on this _____ day of MAR 13 1995, 1995, pursuant to the Stipulation of Dismissal With Prejudice filed herein by the Plaintiff, Fredrick Washington, it is ORDERED ADJUDGED AND DECREED that the Complaint filed in this case is

hereby dismissed with prejudice to the bringing of another action. This dismissal is at the cost of Plaintiff.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

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TEB/jo
2/7/95

FILED

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MAR 13 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WEST AMERICAN INSURANCE COMPANY,

Plaintiff,

vs.

BILLY JOE COUCH,

Defendant.

Case No.: 95-C-127-K

ENTERED ON DOCKET
DATE MAR 14 1995

NOTICE OF DISMISSAL

Comes now the plaintiff West American Insurance Company, pursuant to Rule 41(a)(1)(i) and hereby gives notice that it is dismissing without prejudice its claims and causes of action against the defendant.

Respectfully submitted,

DANIEL, BAKER & HOWARD

BY: Tom E. Baker

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CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing instrument was deposited in the U.S. Mail this 13th day of March, 1995, addressed to Jim Lloyd, 1515 E. 71st St., Ste. 200, Tulsa, OK 74136 with proper postage thereon fully prepaid.

Tom E. Baker

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

J. THOMAS HARES,

Plaintiff,

vs.

THE HOUSING AUTHORITY OF THE CITY OF TULSA,

Defendant.

No. 94-C-386-K

O R D E R

Before the Court is the motion of the defendant Housing Authority for the City of Tulsa ("THA") for summary judgment. Plaintiff brings this action as a result of his discharge as defendant's executive director on April 28, 1993. He asserts causes of action for breach of contract, violation of due process and age discrimination. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

Plaintiff was hired by THA as Director of Finance on September

28

6, 1967. On April 1, 1968, plaintiff was appointed to the position of Deputy Executive Director. In November, 1970, plaintiff was made Acting Executive Director upon the retirement of the previous Executive Director of THA. Plaintiff became the full time Executive Director in January, 1971.

On September 3, 1992, the United States Department of Housing and Urban Development (HUD) issued its report and findings of a Comprehensive Improvement Assistance Program (CIAP) review of THA conducted in August, 1992. The review is performed to evaluate the level of federal funding THA is to receive. The HUD report made thirteen "findings" which are defined as violations of a statute, regulation, HUD handbook requirement, etc.. As a result of this report, THA was designated by HUD as "MOD--Troubled." Failure of THA to improve its designation could result in imposition of financial penalties and sanctions.

A follow-up HUD review was performed between February 1, 1993 and February 12, 1993. The report of this review issued April, 1993 and cited "numerous findings of a serious nature, indicating severe management weaknesses." Concerned about performance, THA engaged an outside consultant to evaluate THA's situation and make recommendations. The consultant's report found "a direct correlation between the existing long term Executive Director's performance and the low PHMAP scores." (Defendant's Exhibit K). Plaintiff was placed on leave of absence by the Board of Commissioners of THA on April 14, 1993 and was terminated April 28, 1993. Plaintiff was 62 years old at the time.

BREACH OF CONTRACT

Plaintiff alleges his termination "was in violation of the personnel policies and procedures of the THA, which policies and procedures were a part of the Employment Contract Agreement between Hares and THA." He further asserts "[t]he personnel policy of the THA requires certain procedures to be followed prior to termination of any employees. These procedures were not followed." Finally, plaintiff seeks damages for this alleged "breach by THA of the express and implied contract between THA and Hares. . . ." (Amended Petition at ¶¶ 6-8).

Plaintiff testified in his deposition he considered himself an employee at will. (Hares depo. at 168.23-25).[1] Under the at-will employment rule, either the employer or employee can terminate the relationship without liability when the length of the master/servant bond is unspecified by contract. Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1224 n.23 (Okla.1992). However, an employer may still be found liable if it made representations to the employee contrary to the at-will status "which could form the basis of a contract. . . ." Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379, 1389 n.11 (10th Cir.1991). The most commonly recognized form of such representations is employee manuals and handbooks.

[1]Plaintiff subsequently modified this answer by correction page to add: "However, I did not think that they could terminate one for no reason or certainly without following any procedures to give one notice of deficiencies and an opportunity to correct those deficiencies." (Exhibit C to Appendix to Defendant's Brief). Plaintiff has not offered into evidence any employment contract between himself and THA specifying a term of years.

In his deposition, plaintiff was only able to point to two provisions of defendant's personnel policy in this connection. Paragraph 1.4 states it is the general purpose of the personnel regulations to assist in accomplishing "(b) security of tenure for Authority employees, subject to need for the work performed by the employee, availability of funds and continued effective performance and acceptable personal conduct of employee." The Court finds this broad expression of purpose does not create an implied contract of continued employment, particularly in view of the dependence upon "continued effective performance." Plaintiff also pointed to Paragraph 8.7, which lists numerous reasons which could constitute termination for cause under the following introductory language: "Discharge for cause must be approved by the Executive Director. Major infractions which warrant discharge may include, but are not limited to, the following:". In Daemi, the United States Court of Appeals for the Tenth Circuit addressed its prior decision in Carnes v. Parker, 922 F.2d 1506 (10th Cir.1991), and noted the court "declined to imply a for-cause requirement as to discharge from a nonexclusive list of grounds for discharge, and an employer representation that administrators 'may carry out disciplinary action towards an employee for just cause'". Daemi, 931 F.2d at 1390. A similar situation is presented here. The Court concludes the defendant's written personnel policy does not create an implied contract between plaintiff and defendant altering the at-will

employment rule.[2]

Plaintiff also argues "several THA Board members have made express statements to Hares that establish an implied contract." (Plaintiff's Response Brief at 20). In his affidavit, attached as Exhibit C in the Appendix to Response Brief, plaintiff states "Former THA Board members Sylvia Couch and Reverend Post made express statements to me indicating that I could remain in my position as Executive Director of the THA until I decided to retire." (¶5). In his deposition, plaintiff testified that a current member of the THA Board, Fred Dorwart, stated to plaintiff in 1992 plaintiff "You'll probably work another four or five years." (Hares depo. at 104.13-17). The Dorwart statement was a casual comment, apparently in reference to plaintiff's health. This is demonstrated by plaintiff's response, "Yes, unless my glaucoma gets worse." The statements by Couch and Post, taken literally, would mean plaintiff could never be terminated, no matter his job performance. In Blanton v. Housing Authority, 794 P.2d 412 (Okla.1990), the Supreme Court of Oklahoma held the executive director of the Norman Housing Authority did not obtain

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[2]In his response brief, plaintiff references an inter-office memorandum dated March 14, 1968 from then-Executive Director James Clouse to plaintiff advising plaintiff he was now listed on Authority records as a "permanent employee." (Plaintiff's Exhibit B). Defendant argues this language was used in contrast to "probationary employee" and that under Oklahoma law, a permanent employee is one employed for an indefinite period until employment is severed by either party. See McKelvy v. Choctaw Cotton Oil Co., 152 P. 414, 415 (Okla.1915). The issue need not be decided, because plaintiff disavowed any reliance regarding future employment upon any document other than THA's Personnel Policy Manual. (Hares depo. at 174.21-25).

a constitutionally protected property interest in his position merely because he stated when hired "as long as my work was satisfactory, why, I would hope to retire from that position", and the Board expressed agreement with that view. Id. at 414-15. By analogy, this Court concludes the statements of Couch and Post[3], did not create an implied contract as to plaintiff's employment. The claim for breach of contract fails.[4]

Violation of Due Process

The Second Cause of Action in the Amended Petition states THA's personnel procedures "created a reasonable expectation of continued employment, which is a property interest protected by both the federal and state constitutions." It further alleges plaintiff's right to due process was violated in that plaintiff was denied a hearing wherein he could confront and cross-examine witnesses. (Amended Petition at ¶¶9-10). The principles governing this cause of action are as follows:

> [Plaintiff's] federal constitutional claim depends on her having a property right in continued employment. If [plaintiff] in fact has such a right, then the government

[3]Couch and Post were only two members of the Board. Section 1.3(b) of the Policy Manual provides "[t]he Executive Director shall place into effect these regulations and amendments thereto as approved by resolution of the Board of Commissioners." Plaintiff has offered no evidence of a Board resolution modifying his employment at-will status.

[4]As for the alleged failure to follow termination procedures, plaintiff admitted on two occasions those procedures as written do not apply to the Executive Director. (Hares depo. at 170.16-171.19; 179.1-9). His statement "in my judgment by inference [the termination procedure] would also apply to the executive director since he or she is an employee of the housing authority", id. at 170.1-3, is of no probative value.

> cannot deprive her of continued employment without procedural due process.
>
> Property interests are not created by the due process clause of the Constitution. Rather, they are created by independent sources such as a state or federal statute, a municipal charter or ordinance, or an implied or express contract.

Carnes v. Parker, 922 F.2d 1506, 1509 (10th Cir.1991)(citations omitted). In attempting to isolate an "independent source" for his purported property interest, plaintiff again relies upon his argument that an implied contract of continued employment was created through the personnel policy or statements of Board members. The Court has rejected his argument in reference to the first cause of action and rejects it again in this context.

In his response brief to defendant's motion, plaintiff raises for the first time the argument that he was also deprived of a protected liberty interest by defendant's actions. This claim does not appear in the Amended Petition; however, defendant has not moved to strike the argument but has instead responded to it. The Court elects to consider it. Four elements must be demonstrated to maintain an actionable liberty interest claim: (1) the statements must impugn the good name, reputation, honor, or integrity of the employee; (2) the statements must be false; (3) the statements must occur in the course of terminating the employee or must foreclose other employment opportunities; (4) the statements must be published. Workman v. Jordan, 32 F.3d 475, 481 (10th Cir.1994).

On this point, plaintiff's brief states: "there have been several articles written about Hares' termination in the Tulsa

World. One such article contained accusations by THA Board members of 'severe management weaknesses' and 'mismanagement of federal funds' in referring to reasons for Hares' termination. Exhibit P -- Tulsa World, April 29, 1993." (Plaintiff's Response Brief at 26-27). This is a misrepresentation of the article. The quoted phrases, as the article makes plain, came from the HUD report regarding THA, not from THA Board members. Neither Exhibit O nor Exhibit P, both Tulsa World articles, contains any stigmatizing statements made by defendant. Also, a plaintiff must demonstrate a damage to reputation plus the deprivation of some other constitutionally cognizable interest in order to state a claim upon which relief can be granted. See, e.g., Corbitt v. Andersen, 778 F.2d 1471, 1474-75 (10th Cir.1985)(holding that damage to reputation plus the impairment of future employment constitutes a due process violation). Plaintiff herein has made no showing of impairment of future employment, aside from a conclusory statement in paragraph 9 of his affidavit (Exhibit C in Appendix to Plaintiff's Response Brief). Summary judgment is appropriate as to plaintiff's claimed deprivation of a liberty interest as well.

Age Discrimination

Finally, plaintiff alleges his termination was in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§621 et seq. The framework for assessing the evidence in an age discrimination case parallels that applicable in a Title VII case. Spulak v. K Mart Corp., 894 F.2d 1150, 1153 (10th Cir.1990). An employee establishes a prima facie case by showing that (1) the employee

belongs to the protected age group; (2) the employee's job performance was satisfactory; (3) the employee was discharged; (4) the employee was replaced by a younger person. MacDonald v. Eastern Wyo. Mental Health Ctr., 941 F.2d 1115, 1119 (10th Cir.1991). If a prima facie case is made, the employer must articulate a "facially nondiscriminatory" reason for its employment decision. The burden then shifts to the employee to present probative evidence which could support the inference that the employer's reason was merely a pretext for discrimination. Bolton v. Scrivner, Inc., 36 F.3d 939, 943 (10th Cir.1994).

The Court concludes plaintiff has failed to establish a prima facie case because his proof fails as to the second required element, i.e., satisfactory job performance. The findings by HUD and by outside consultants indicated "direct correlation" between plaintiff's performance and HUD's low scores for THA. Assuming arguendo plaintiff has established a prima facie case, defendant has articulated a facially nondiscriminatory reason for the termination, that being the poor job performance reflected in the HUD findings and the outside consultant reports. Finally, plaintiff has failed in his ultimate burden of proving pretext. Indeed, in his deposition, plaintiff described it as only a "possibility" that he had been discharged because of his age. (Hares depo. at 160.8-15). A mere possibility of discrimination is insufficient to defeat a motion for summary judgment, and plaintiff's assertion is self-serving in any event. The Court concludes plaintiff's age discrimination claim is also subject to

summary judgment.

It is the Order of the Court that the motion of the defendant for summary judgment is hereby GRANTED.

ORDERED this 10 day of March, 1995.

Terry C Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LAYMON HARRIS,)
)
Plaintiff,)
)
vs.) No. 94-C-327-B
)
STANLEY GLANZ,)
)
Defendant.)

ORDER

In this prisoner's civil rights action, Plaintiff, pro se and in forma pauperis, alleges that Stanley Glanz, Sheriff of Tulsa County, violated his rights under the First, Eighth, and Fourteenth Amendments while he was a pretrial detainee at the Tulsa County Jail. Defendant has moved to dismiss or, in the alternative, for summary judgment to which the Plaintiff has responded. The Plaintiff has also filed a cross motion for summary judgment. For the reasons stated below, the Court grants in part Defendant's motion to dismiss and for summary judgment and denies Plaintiff's cross motion for summary judgment.

I. BACKGROUND and PROCEDURAL HISTORY

Plaintiff was incarcerated in the Adult Detention Center (ADC) of Tulsa County from October 27, 1993, through March 20, 1994, at which time he was moved to the Eighth/Ninth Floor of the Tulsa County Jail, where he remained until April 29, 1994.

On April 5, 1994, Plaintiff filed the instant civil rights action enumerating the following alleged violations:

"(1) Denied right to religion-no use of chapel

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(2) Denied ample space-cells overcrowded. (While housed at ADC a 60 man tank had as many as 78 people) (Here in the County a twelve man tank has had as many as seventeen in a tank.) (slept on floor)
(3) Smoking in certain places prohibited-exemptions 1-1523 D. This section shall not apply to areas which prisoners are housed in municipal jails, county jails or correctional institutions as defined in section 502 of Title 57 of the Oklahoma Statutes.
(4) Denied exercise privilege-I have not been outside once since . . . confined (six months).
(5) Denied change of uniform-Hasn't changed uniform since laundry was moved [to ADC] (approximately 1 mo.)
(6) Housed were there are no adequate fire alarms, fire extinguishers, or sprinkler system. (Fire hazard)
(7) Denied access to Library. (Law Library)."

(Doc. #1, spelling and punctuation in original.) Plaintiff seeks compensatory damages.

Although Plaintiff's complaint alleges in some instances claims on behalf of all pretrial detainees, the Court has liberally construed Plaintiff's complaint to allege only whether Defendant's action or inaction violated Plaintiff's own civil rights. It is well established that one may not sue or recover damages for violations of another's civil rights under 42 U.S.C. § 1983. See McGowan v. State of Maryland, 366 U.S. 420, 429 (1961); Reynoldson v. Shillinger, 907 F.2d 124, 125 (10th Cir. 1990).

II. ANALYSIS

A. Dismissal for Failure to State a Claim

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988). For purposes of reviewing a complaint for failure to state a claim, all allegations

in the complaint are presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972).

Because Plaintiff was a pretrial detainee during the events at issue, he is not entitled to relief under the Eighth Amendment. The Fourteenth Amendment Due Process Clause, not the Eighth Amendment's protections against cruel and unusual punishment protect a pretrial detainee such as the Plaintiff. See Bell v. Wolfish, 441 U.S. 520 (1979). Therefore, even liberally construing Plaintiff's complaint in accordance with his pro se status, The Court concludes that Plaintiff can show no set of facts entitling him to relief under the Eighth Amendment.

As to the remaining allegations, the Court concludes that Plaintiff has failed to state a claim against Defendant Glanz, in his individual capacity. The Plaintiff has not alleged any facts in support of his claim that Defendant Glanz caused or participated in any alleged constitutional violations. It is well established that a defendant may not be held individually liable under section 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a section 1983 action.

Accordingly, Defendants' motion to dismiss for failure to

state a claim must be granted in part.

C. Summary Judgment

1. Standard

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. The court cannot resolve material factual disputes at summary judgment based on conflicting affidavits. Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991). However, the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not

sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. The court may treat the Martinez Report as an affidavit in support of a motion for summary judgment, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972). When reviewing a motion for summary judgment it is not the judge's function to weigh the evidence and determine the truth of the matter but only to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249.

2. Rights of Pretrial Detainees

"There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). Even convicted prisoners do not forfeit all constitutional rights by reason of their conviction and confinement

in prison. Bell v. Wolfish, 441 U.S. 520, 545 (1979). Those rights retained include freedom of speech and religion under the First and Fourteenth Amendments. See e.g. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987). The court has recognized that pretrial detainees retain at least those constitutional rights as those retained by convicted prisoners. Bell, 441 U.S. at 545. However, these rights are not immune from restrictions or limitations pursuant to lawful incarceration. Id. at 545-46. Detainees do not possess the full range of freedoms as unincarcerated individuals. Id. at 546. Courts must accommodate both the legitimate needs of the institution and the rights of the incarcerated. See id. Courts should ordinarily defer their judgment in the day-to-day operations of a corrections facility to the appropriate officials unless there is substantial evidence that the response is exaggerated. Id. at 546-47.

Conditions or restrictions which implicate only the detainee's liberty interest are evaluated under the Due Process Clause. Bell, 441 U.S. at 535. Because a detainee cannot be punished without adjudication of guilt in accordance with due process of law, restrictions which amount to punishment are invalid. See id. Loss of freedom of choice and privacy are inherent incidents of lawful confinement and, while they interfere with the detainee's desire to live as comfortably as possible, do not amount to punishment. Id. at 537. Absent a showing of intent to punish on the part of corrections officials, if a condition or restriction is reasonably

related to a legitimate government objective, without more, it is valid. Id. at 538-39. However, if the restriction is arbitrary, purposeless, or appears excessive in relation to the purpose assigned to it, the court may infer a punitive purpose. Id. Such a restriction, although not imposed with the expressed intent to punish, contravenes a detainee's rights under the Fourteenth Amendment. See id.

3. Analysis of Plaintiff's Individual Claims

(a) Denial of Group Religious Services

Prisoners continue to be protected by the First Amendment even while incarcerated, including the right of free exercise of religion, O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987), abrogated on other grounds by statute, Allah v. Menci, 844 F.Supp. 1056 (E.D. Penn 1994), and prison authorities must afford prisoners "reasonable opportunities . . . to exercise the [R]religious freedom guaranteed by the First . . . Amendment[]." Cruz v. Beto, 405 U.S. 319, 321 n.2 (1972). Nevertheless, lawful incarceration necessarily brings about restrictions on certain constitutional rights, including the right of free exercise of religion. Thornburgh v. Abbott, 490 U.S. 401, 405 (1989). Limitations on free exercise derive both from the fact of incarceration as well as valid penological objectives, such as security within the institution, deterrence of crime and rehabilitation of prisoners. O'Lone, 482 U.S. at 348.

Before November 16, 1993, a prison regulation which impinged

on a prisoner's desire to pursue his religion did not violate the First Amendment if it was "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987), abrogated by statute, Allah, 844 F.Supp. 1056. The recently enacted Religious Freedom Restoration Act, 42 U.S.C.A. §§ 2000bb to 2000bb-4 (West Supp. 1994) ("RFRA"), however, abolishes the Turner and O'Lone standards. Under the new RFRA standard, if the government "substantially burden[s] a person's exercise of religion," it must demonstrate that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.A. § 2000bb-1.

Although neither party brought this Act to the Court's attention, RFRA may apply to this case. By its terms, RFRA applies retroactively, 42 U.S.C.A. § 2000bb-3(a), and it applies to the First Amendment rights of prison detainees. Campos v. Couglin, 854 F.Supp. 194, 206 (S.D.N.Y. 1994); Allah v. Menei, 844 F.Supp. 1056, 1062 nn.18-19 (E.D.Pa. 1994). Therefore, the Court will analyze Plaintiff's First Amendment claims under both the pre-RFRA and post-RFRA standards.

(1) Pre-RFRA Standard

Regulations preventing prisoners' attendance at group religious services do not violate the Free Exercise Clause where they are reasonably related to security and rehabilitative concerns. O'Lone, 482 U.S. at 350-353. In addition, denial of separate church services because of security and space interests

has been held valid where inmates were provided alternative means of practicing their religion. Clifton v. Craig, 924 F.2d 182, 184 (10th Cir.), cert. denied, 112 S.Ct. 97 (1991).

In the instant case, Plaintiff contends that the County Jail does not provide group religious services for all inmates on the eighth and ninth floors of the county jail and for some ADC inmates. (Doc. #8.) Plaintiff does not dispute, however, that he could visit with a minister at a variety of times. According to the Report group religious services may be held at the ADC twice a week. However, no group services are held for male inmates at the county jail based on the "archaic conditions" of the jail and security concerns, including a high risk of escape of the majority of the detainees at the county jail. (Doc. #6 at 3-4.) In addition, the regulation at issue permits ministers to visit inmates at a variety of times and to leave soft-bound religious materials with any inmate. (Id.)

Prior to RFRA, a prison regulation which infringed on a specific constitutional right was valid if it reasonably related to a legitimate penological interest. O'Lone, 482 U.S. at 349; Turner v. Safley, 482 U.S. 78, 89 (1987). The policy must be evaluated in light of the essential institutional goals of maintaining security and internal order. Bell, 441 U.S. at 546-47. The Supreme Court has articulated several factors relevant in determining the reasonableness of a regulation. O'Lone, 482 U.S. at 350; Turner, 482 U.S. at 89-91. First, there must be a logical connection between the regulation and the government interest

relied upon to justify it. O'Lone, 482 U.S. at 350. Second, the presence or absence of alternative accommodations for the prisoner's right must be considered. Id. at 351. A third factor is the impact that the accommodation would have on other inmates, guards, and allocation of prison resources. Turner, 482 U.S. at 90. Finally, the existence of obvious and easy alternatives may be evidence that the regulation is not reasonable. Id. This factor does not require that prison officials adopt the least restrictive alternative, rather, if there is evidence of an alternative that fully accommodates the infringed right at de minimis cost to the valid interests the court may consider the evidence that the regulation is not reasonable. Id. at 91.

After carefully reviewing the record in this case, the Court concludes that the regulation prohibiting male pretrial detainees on the eighth and ninth floors of the county jail from attending group religious services is reasonably related to a legitimate penological interest in security. First, the regulation is logically related to the interest asserted. The majority of the inmates on the eighth and ninth floors are indeed high escape risks even if the Plaintiff was not. Clifton, 924 F.2d at 184. The Court notes, however, that Plaintiff had felony counts pending in Okmulgee county, and as such, securing his appearance for those counts was of prime importance. Second, Plaintiff had alternative opportunities to pursue his religion. Although Plaintiff may contend that these opportunities did not provide the same fellowship as group services would have provided, (doc. #1 at 3a),

the Constitution only proscribes the deprivation of all means of expression. See O'Lone, 482 U.S. at 352. Here, Plaintiff retained access to ministers and religious materials, as well as the fellowship of other inmates in his cell.

Therefore, the Court concludes that there remain no genuine issues of material fact that the regulation in question is sufficiently related to the legitimate penological interest in security to be valid. This analysis is further supported by this Court's finding in Clayton v. Thurman, No. 79-C-723-B (N.D. Okla. Sept. 10, 1987) (Findings of Fact and Conclusions of Law) that legitimate security considerations preclude jail officials from conducting group religious services at the Tulsa County jail.[1]

Even assuming that the ban on group religious services for security reasons were unreasonable, the Court notes that Plaintiff has failed to establish interference with his own free exercise rights. Plaintiff has completely failed to demonstrate that he has any sincerely held religious beliefs or that the religion, if any, that he practices requires group religious expression. Consequently, he has failed to show that the ban on group worship interfered in anyway with his own religious expression.

(2) Post-RFRA Standard

Under RFRA, prison authorities may not substantially burden a person's exercise of religion unless they can demonstrate that such a burden furthers a compelling governmental interest and is the

[1]In Clayton, this Court addressed the issue of whether providing group religious services at the County Jail for women but not for men violated the Equal Protection Clause.

least restrictive means of furthering the compelling interest. The Act provides that the Government bears the burdens of going forward with the evidence and of persuasion with respect to the compelling interest test. 42 U.S.C. § 2000bb-2. Plaintiff must make a threshold showing, however, that his religious exercise has been substantially burdened. 42 U.S.C.A. § 2000bb-1(a); Bryant v. Gomez, ___ F.3d ___, 1995 WL 34272 (9th Cir. Jan. 31, 1995) (per curiam); Brown-El v. Harris, 26 F.3d 68, 69 (8th Cir. 1994).

In this case, the Court does not reach the compelling interest test articulated in RFRA because Plaintiff has failed to make a threshold showing that the government "substantially burden[ed]" the exercise of Plaintiff's religion. While Plaintiff may have shown an interference with group religious services in general, he has not presented any facts to show that group religious services are mandated by his religion. See Bryant, ___ F.3d ___, 1995 WL 34272, at *1 (holding that inmate would not be entitled to relief under the "substantial burden" test because he had not shown that the activities which he wished to engage in were mandated by the Pentecostal religion). To establish a free exercise violation under the "substantial burden test,"

> the religious adherent . . . has the obligation to prove that a governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.

Bryant, ___ F.3d ___, 1995 WL 34272, at *1 (quoted case omitted).

The Plaintiff has not met the above burden in this case.

Accordingly, because Plaintiff has not sufficiently pleaded a RFRA violation, the Court concludes that Defendant is entitled to judgment as a matter of law on Plaintiff's free exercise claim.

(b) Access to the Courts and the Law Library

Next, Plaintiff alleges that Defendant interfered with his constitutional rights of access to the law library. He contends in his response (doc. #8) that it took almost one month to obtain information on an attempted burglary charge and that no one was available to help him interpret the information once he received it.

A detainee, just like a convicted inmate, has a constitutional right to adequate, effective, and meaningful access to the courts and the law library. Love v. Summit County, 776 F.2d 908, 912 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986).

> The right is one of the privileges and immunities accorded citizens under article four of the Constitution and the Fourteenth Amendment. It is also one aspect of the First Amendment right to petition the government to redress grievances. Finally the right of access is founded on the due process clause and guarantees the right to present to a court of law allegations concerning the violation of constitutional rights.

Smith v. Maschner, 899 F.2d 940, 947 (10th Cir. 1990) (citation omitted).

In Bounds v. Smith, 430 U.S. 817, 827 (1977), the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from

persons trained in the law."

After reviewing the Special Report and Plaintiff's response, the Court concludes that Plaintiff has not demonstrated a total deprivation of legal materials. The special report reveals that Plaintiff had access to the law library during his stays in RHU through visits from the legal assistant. The Special Report reveals that, although an inmate is not allowed to go to the law library, a jailer is assigned to pick-up library request from inmates and then to provide the material requested. The report further states that, even if the inmate does not know what materials he needs, he can explain what the charges are and the assigned jailer will try to find pertinent information.

Even if Plaintiff was denied access to the law library due to the delay in providing him the requested materials, this Court concludes that Plaintiff has not shown any actual injury as a result of the delay or denial he has suffered. Since prejudice is an essential element for maintaining a claim for denial of access to the courts, Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978), Plaintiff's claim for denial of access to the courts must fail.

(c) General Conditions of Confinement

The remainder of Plaintiff's complaint centers around general conditions of his confinement. The treatment a detainee receives in jail and the conditions under which he is confined are subject to constitutional scrutiny under the Fourteenth Amendment. See Bell v. Wolfish, 441 U.S. 520, 535 (1979). A detainee may not be

subject to conditions which amount to punishment or otherwise violate the constitution. Id. at 537. Conditions which are intended as punitive or are not reasonably related to a legitimate governmental interest violate a detainee's due process rights. Id. at 538-39.

Plaintiff alleges that he was (1) housed in an overcrowded cell; (2) denied adequate exercise and fresh air; (3) deprived of a clean uniform and a clean towel; (4) refused the right to smoke; and (5) housed where there were no fire alarms.

The Court cannot become involved in the minor details of running the county jail. Daily decisions concerning detainees are best left to those entrusted with their confinement. Only where constitutional abuse is apparent should the Court interfere with the administrative functioning of the jail. It is fundamental that loss of liberty and freedom of choice occur during lawful incarceration. Corrections officials cannot accommodate the precise needs of every inmate. Consequently, some level of discomfort is inherent in any incarceration, and as long as that discomfort does not amount to punishment it does not violate a detainee's constitutional rights.

The majority of Plaintiff's complained of conditions except for the alleged denial of exercise, a clean uniform, and a clean towel do not amount to punishment. While prison overcrowding may violate the Constitution where it is so egregious that it endangers the safety of inmates, the Plaintiff has failed to show that the crowded condition at the Tulsa County Jail caused Plaintiff any

physical injury.[2] Even if Plaintiff was forced to sleep on a mattress on the floor, as he states in his response, the Constitution is indifferent as to whether the mattress a detainee sleeps on is on the floor or on a bed absent some aggravating circumstances. See Mann v. Smith, 796 F.2d 79, 85 (5th Cir. 1986); Castillo v. Bowles, 687 F.Supp. 277, 281 (N.D. Tex. 1988).

Similarly, the Court concludes that neither the ban on smoking nor the lack of a sprinkler system amount to punishment in violation of the Fourteenth Amendment. Smoking is prohibited in the county jail because it could constitute the violation of a non-smoking inmates' constitutional rights. See Helling v. McKinney, 113 S.Ct. 2475 (1993). Moreover, while the Tulsa County Jail does not have a sprinkler system, it has fire alarms, smoke detectors, and fire extinguishers. (Special Report at 10.)

The Court concludes, however, that there remain genuine issues of material fact as to the lack of outdoor exercise. While Defendant's policy of prohibiting high-escape risk inmates from participating in the county jail's exercise program is reasonably related to a legitimate penological interest, see Martin, 845 F.2d at 1457 (denial of outdoor exercise was related to legitimate

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[2]The Crime Control and Law Enforcement Act of 1994 recently amended title 18 of the United States Code by adding at the end section 3626 on prison overcrowding. Subsection (a)(1) of section 3626 requires the following showing with respect to a particular plaintiff claiming prison overcrowding:

> (1) HOLDING.--A Federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment of that inmate.

prison concern in security, based on escape charge pending against detainee, and thus was not a constitutional deprivation), Plaintiff has raised sufficient questions as to whether he was classified as a high-escape risk. Plaintiff alleges that he did not wear the yellow arm band and that his bond was only $11,000.

Similarly, the Court concludes that there remain genuine issues of material fact as to whether Plaintiff was denied a clean uniform and towel for more than a temporary period of time. Although the Special Report reveals that inmates should be given an opportunity to receive a complete change of clean clothing at least once a week, the Plaintiff has controverted Defendants' statement by presenting a copy of a "prison grievance" which reveals that Plaintiff did not receive a clean towel for over one month. Because the failure to regularly provide prisoners with clean towels and clothing constitutes a denial of personal hygiene and sanitary living conditions, see, e.g., Dawson v. Kendrick, 527 F.Supp. 1252, 1288-89 (S.D.W.Va. 1981); see also Williams v. Hart, 930 F.2d 36, 1991 WL 47118, at *2 (10th Cir. 1991) (unpublished opinion), the Court denies Defendants' motion for summary judgment as to this issue.

d. Transfer

In his response Plaintiff argues for the first time that Defendant transferred him from the ADC to the eighth/ninth floor of the County Jail without giving him any explanation.

Plaintiff has no constitutional right to be incarcerated in a

particular cell or facility, and his transfer from the ADC to the eighth/ninth floor of the County Jail, in and of itself, does not implicate a constitutional right of the Plaintiff. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Thus, any expectation Plaintiff may have had in remaining at ADC is too insubstantial to rise to the level of a due process protection. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of deprivation of his 'right' in violation of due process"). Additionally, federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983). Accordingly, Defendant is entitled to judgment as a matter of law on this claim as well.

III. CONCLUSION

After liberally construing Plaintiff's complaint for purposes of Defendant's motion to dismiss, the Court concludes that Defendants' motion to dismiss should be granted as to Plaintiff's claim under the Eighth Amendment and as to any claims against Defendant Glanz in his individual capacity. Viewing the evidence in the light most favorable to the Plaintiff for purposes of

Defendant's motion for summary judgment, the Court concludes that Defendant is entitled to judgment as a matter of law on all of Plaintiff's remaining claims except as to his claims that he was denied fresh air and exercise and a clean uniform and towel.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendant's motion to dismiss and for summary judgment (doc. #4) is **granted in part and denied in part**; and

(2) Plaintiff's motion for summary judgment (doc. #7) is **denied**.

SO ORDERED THIS 6th day of Mar., 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OLAKUNLE LANRE ARGBEDE,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

No. 94-CV-1082-B

ORDER

On November 28, 1994, the Clerk mailed to the Petitioner a letter notifying him that his petition for a writ of habeas corpus was not on the authorized form and that he should either pay the filing fee or file a motion for leave to proceed in forma pauperis. On December 19, 1994, the Clerk's letter and the necessary forms were returned to the Court with the notation "address unknown."

ACCORDINGLY, IT IS HEREBY ORDERED that the above captioned habeas corpus action is hereby dismissed for lack of prosecution.

SO ORDERED THIS 8 day of March, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 13 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TOM SHADWICK,

Plaintiff,

vs.

92-C-130-B

DONNA E. SHALALA, Secretary of Health and Human Services,

Defendant.

ENTERED ON DOCKET

DATE 3-13-95

O R D E R

This matter comes on for consideration upon a Motion for Attorney's Fees (Docket #15) in the amount of $2,887.50. The Court has jurisdiction to award attorney's fees under the Social Security Act for services rendered. Harris v. Secretary of HHS, 836 F.2d 496 (10th Cir. 1987).

The defendant has no objection to the Court approving an attorney fee award of $2,887.50.

The Court concludes Plaintiff's Motion for Attorney's Fees should be and the same is hereby SUSTAINED. Plaintiff's attorney, Paul F. McTighe, is awarded an attorney's fee in the amount of $2,887.50.

IT IS SO ORDERED this 7th day of March, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN TOWNSHEND, personally and derivatively for other minority shareholders similarly situated,

Plaintiff,

v.

SUNBURST MINING CORPORATION, a Nevada corporation doing business in Tulsa, Oklahoma, and GUTAPA, a partnership, and JERRY LONG, individually, and RICKEY SHORES, individually, and any consenting shareholders,

Defendants.

Case No. 95-C-230-B

O R D E R

Before the Court for consideration is Plaintiffs' Motion For a Temporary Restraining Order, pursuant to Fed.R.Civ.P. 65.

Plaintiff John Townshend seeks the ex parte TRO to prevent Defendant Rickey Shores from acting as an agent on behalf of Defendant Sunburst Mining Corporation and from conducting any corporate action on behalf of Sunburst.

Rule 65(b) provides, in part:

> **(b) Temporary Restraining Order; Notice; Hearing; Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

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The Court concludes that Plaintiff's Motion is deficient because the facts alleged in the Motion and the Verified Complaint, relating to notice and the opportunity to be heard, do not comply with Rule 65(b). Townshend's attorney, Terrel B. DoRemus, filed a Certificate in support of the Motion that stated he attempted to telephone Shores on March 1, March 2, and March 6, 1995, but that Shores failed to return the calls. DoRemus said he left messages with an unknown person for Shores "to return my call concerning Sunburst and that I was an attorney representing John Townshend." *See* Certificate, ¶ 1. However, Rule 65(b) requires the attorney to certify to the Court the efforts to give notice of the TRO application. The certificate does not state that DoRemus attempted to give notice of the TRO application; rather, he says only that he called Shores "concerning Sunburst" from four to ten days before the TRO application was filed.

Further, in order to obtain a TRO, the following four factors must be met:

1) that the Plaintiff will suffer irreparable harm if the injunction does not issue;
2) that the balancing of harms between the parties weighs in favor of the Plaintiff;
3) that public interest is furthered by the injunction; and
4) that the Plaintiff has demonstrated a probability of success on the merits underlying the injunction request.

See Anthony v. Texaco, Inc., 803 F.2d 593 (10th Cir. 1986); Koerpel v. Heckler, 797 F.2d 858 (10th Cir. 1986), and Kansas Health Care Association v. Kansas Department of Social and Rehabilitation Services, 31 F.3d 1536 (10th Cir. 1994).

The Court notes that Townshend has not alleged in his Motion that he meets any of these requirements other than irreparable harm. Therefore, Townshend's Motion For Temporary Restraining Order is hereby DENIED. A hearing on the preliminary injunctive relief sought by Townshend will be held on March 22, 1995, at 10:00 a.m., before Magistrate Judge John L. Wagner.

Parties are directed to file suggested Findings of Fact and Conclusions of Law on or before March 20, 1995.

IT IS SO ORDERED this 10 day of March, 1995.

for Terry C. Kern

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SHIPLEY, INHOFE & STRECKER, an Oklahoma partnership,

Plaintiff,

v.

BLUEWATER LEASING, INC., a Michigan corporation; ROSS E. LINDSAY, an individual; JAY M. MONTROSE, an individual; and LARRY L. McANALLY, an individual,

Defendants.

Case No. 94-C-607-B

ORDER

Upon the Application of the Plaintiff and the Defendant McAnally, and for good cause shown, it is hereby

ORDERED that this case is stricken from the March 20, 1995 trial docket; and it is

FURTHER ORDERED that this case is administratively terminated, without prejudice, subject to being reopened in the event that the parties' Settlement Agreement is not fully performed; provided, however, that if no motion to reopen is filed on or before October 16, 1995, the case shall then be deemed dismissed with prejudice.

DATED this 10th day of March, 1995.

Terry C. Kern
UNITED STATES DISTRICT JUDGE
for Thomas R. Brett, Chief Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 10 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 03 1995

DOROTHY A. EVANS, CLERK
U. S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
REV. BARRY BILDER	Case No. 91-00221-C
Debtor.	Chapter 7

95-C-105-B

ENTERED ON DOCKET

DATE MAR 13 1995

STIPULATION DISMISSING APPEAL

The parties to the Debtor's Objection to the Proof of Claim of the Internal Revenue Service in the above bankruptcy hereby stipulate that the appeal filed on January 30, 1995, in this contested matter be dismissed, each party to bear its own litigation expenses, including costs and attorney fees.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEROME MARCUS DAY, JR. and JANIECE H. DAY,

Plaintiffs,

v.

COMMERCIAL UNION INSURANCE COMPANY, a foreign insurer,

Defendant.

Case No. 94-C-51-K

STIPULATION OF DISMISSAL

The parties herein, by and through their counsel of record, hereby stipulate and agree that the above styled and numbered cause may be dismissed with prejudice to the bringing of any further action against such defendant for the reason that the parties to this action have reached an amicable compromise and settlement. Each party is to bear its own costs and attorney fees.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

rmg\day.sod\cld\950203

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

J. THOMAS HARES,

Plaintiff,

vs.

THE HOUSING AUTHORITY OF THE CITY OF TULSA,

Defendant.

No. 94-C-386-K

JUDGMENT

This matter came before the Court for consideration of the defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 10 day of March, 1995.

Terry C Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 10 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD E. TYLER, II; LANA C. TYLER; REGINA L. MEIGS; COUNTY TREASURER, Tulsa County, Oklahoma; **BOARD OF COUNTY COMMISSIONERS,** Tulsa County, Oklahoma; **TULSA ADJUSTMENT BUREAU, INC.,** a corporation; **MARK FRAZIER MEIGS,**

Defendants.

ENTERED ON DOCKET
DATE MAR 13 1995

CIVIL ACTION NO. **93-C-971-B**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10th day of March, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **Regina L. Meigs**, appears not, having summary judgment entered on March 1, 1995; the Defendant, **Tulsa Adjustment Bureau, Inc., a corporation**, appears not, having previously filed its Disclaimer; and the Defendants, **Richard E. Tyler, II; Lana C. Tyler; and Mark Frazier Meigs**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Regina L. Meigs**, was served with Summons and Amended Complaint on April 29, 1994; that the

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

Defendant, **Tulsa Adjustment Bureau, Inc., a corporation**, acknowledged receipt of Summons and Amended Complaint on February 4, 1994; that the Defendant, **Mark Frazier Meigs**, acknowledged receipt of Summons and Amended Complaint on March 18, 1994; that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on November 3, 1993; and that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on November 2, 1993.

The Court further finds that the Defendants, **Richard E. Tyler, II and Lana C. Tyler, were** served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning May 31, 1994, and continuing through July 5, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Richard E. Tyler, II and Lana C. Tyler**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Richard E. Tyler, II and**

Lana C. Tyler. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Small Business Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on December 8, 1993; that the Defendant, **Tulsa Adjustment Bureau, Inc., a corporation**, filed its Disclaimer on February 7, 1994; that the Court has entered summary judgment against the Defendant, **Regina L. Meigs**, on March 1, 1995; and that the Defendants, **Richard E. Tyler, II; Lana C. Tyler; and Mark Frazier Meigs**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain promissory note and for foreclosure of a mortgage

securing said promissory note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot 37, Block 11, Summerfield Addition, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof. Otherwise known as 3384 South 137th East Avenue.**

The Court further finds that on November 26, 1984, the Defendant, Richard E. Tyler, II, executed and delivered to the United States of America, acting through the Small Business Administration, his promissory note in the amount of $116,100.00, payable in monthly installments, with interest thereon at the rate of 4 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Richard E. Tyler, II, executed and delivered to the United States of America, acting through the Small Business Administration, a real estate mortgage dated November 26, 1984, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on November 27, 1984, in Book 4830, Page 1247, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 18, 1986, the Defendant, Richard E. Tyler, II, executed and delivered to the United States of America, acting through the Small Business Administration, a Modification of Promissory Note pursuant to which the repayment terms of said note were modified.

The Court further finds that the Defendant, Richard E. Tyler, II, made default under the terms of the aforesaid note,

mortgage, and modification of promissory note by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Richard E. Tyler, II**, is indebted to the Plaintiff in the principal sum of $66,372.78, plus accrued interest in the amount of $8,991.55 as of October 7, 1993, plus interest accruing thereafter at the rate of 4 percent per annum or $7.27 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has liens on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $2,013.50, plus penalties and interest, for the years 1993 ($1,088.83) and 1994 ($924.67). Said liens are superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $72.02 which became a lien on the property as of 1991. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Regina L. Meigs**, claims a right, title or interest in the subject real

property by virtue of a Quit-Claim Deed, dated March 31, 1992, and recorded on July 17, 1992, in Book 5420, Page 1811 in the records of Tulsa County, Oklahoma. Any claim based upon said deed is subsequent, junior, and inferior to the Plaintiff's lien upon the subject property.

The Court further finds that the Defendant, **Tulsa Adjustment Bureau, Inc., a corporation**, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, **Lana C. Tyler and Mark Frazier Meigs**, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Small Business Administration, have and recover judgment in rem against the Defendant, **Richard E. Tyler, II**, in the principal sum of $66,372.78, plus accrued interest in the amount of $8,991.55 as of October 7, 1993, plus interest accruing thereafter at the rate of 4 percent per annum or $7.27 per day until judgment, plus interest thereafter at the current legal rate of 6.57 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $2,013.50, plus penalties and

interest, for ad valorem taxes for the years 1993 ($1,088.83) and 1994 ($924.67), plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $72.02 for personal property taxes for the year 1991.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any right, title or interest in the subject real property of the Defendant, **Regina L. Meigs**, is foreclosed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Lana C. Tyler; Board of County Commissioners, Tulsa County, Oklahoma; Tulsa Adjustment Bureau, Inc., a corporation; and Mark Frazier Meigs**, have no right, title or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Richard E. Tyler, II**, to satisfy the **in rem** judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $2,013.50, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $72.02, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

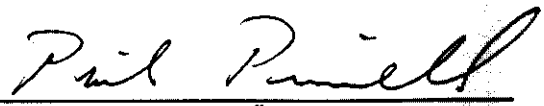
s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

for Thomas R. Brett, Chief Judge

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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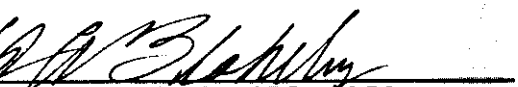

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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-971-E

PP:css

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAR 1 3 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JOAN VIRDEN,

Plaintiff,

v.

JANE PHILLIPS EPISCOPAL HOSPITAL, an Oklahoma Non-Profit Corporation,

Case No. 94 C 563 B

ENTERED ON DOCKET
DATE MAR 13 1995

JOINT STIPULATION FOR
DISMISSAL WITH PREJUDICE

The Plaintiff Joan Virden and the Defendant, Jane Phillips Episcopal Hospital, an Oklahoma Non-Profit Corporation, represent to the Court that they have reached a full and final settlement of the claims asserted in this action and thereby jointly stipulate for its dismissal with prejudice, each side to bear her or its own costs, expenses and attorneys' fees.

PAT MALLOY, JR., OBA #5646
JAMES R. HUBER, OBA #15173

By _____

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(918) 747-3491

Attorneys for Plaintiff

DAVID E. STRECKER, OBA No. 8687
CONNIE LEE KIRKLAND, OBA No. 14262

By _____

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15 East Fifth Street
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(918) 582-1720
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of March, 1995, a true and correct copy of the above and foregoing document was delivered to:

Pat Malloy, Jr.
James R. Huber
Malloy & Malloy
1924 South Utica
Tulsa, OK 74104

Connie Kirkland

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK R. LANE)
)
Plaintiff,)
)
vs.) No. 94-C-794-BU
)
MICHAEL W. CARR)
)
Defendants.)

ORDER

On February 21, 1995, the Court notified the Plaintiff that in eleven days the Court would dismiss this action for failure to serve the Defendant in this case within 120 days after the filing of the complaint. See Fed. R. Civ. P. 4(m). The Plaintiff has not responded.

ACCORDINGLY, the above captioned case is hereby **dismissed** for failure to serve the Defendant within 120 days after the filing of the complaint.

SO ORDERED THIS 10 day of March, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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